THE SUPREME COURT'S CHIEF UMPIRE:

JUDGING THE LEGAL RHETORIC AND JUDICIAL PHILOSOPHY OF

JOHN G. ROBERTS, JR.

A Dissertation

by

JAY MAURICE HUDKINS

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

August 2011

Major Subject: Communication

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Approved by:

Chair of Committee,	James Arnt Aune
Committee Members,	James Kevin Barge
	Leroy G. Dorsey
	Roy B. Flemming
Head of Department,	Richard L. Street

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ABSTRACT

The Supreme Court's Chief Umpire: Judging the Legal Rhetoric and Judicial Philosophy of John G. Roberts, Jr. (August 2011)

Jay Maurice Hudkins, B.S.E., Baylor University;

M.A., Baylor University

Chair of Advisory Committee: Dr. James Arnt Aune

Many Supreme Court followers contended that Judge John Roberts entered his Supreme Court confirmation hearings as a "stealth candidate" who lacked a paper trail the Judiciary Committee could vet to discern the interpretive approach, or judicial philosophy, to which Judge Roberts' subscribed. This dissertation used rhetorical criticism as a methodological approach for examining this claim. A close-reading of Roberts' law journal articles, his writings from his service during the Reagan and Bush (41) administrations, the text of his appellate court confirmation testimony and published opinions, and the text of his Supreme Court confirmation testimony and published opinions reveals that Roberts was not a "stealth candidate" but instead a jurist who resolved constitutional, judicial, political, and statutory issues by incorporating components of originalism and positivism into his prudentialist judicial philosophy.

The first two chapters of the dissertation provide the requisite background for the study. Chapter I discusses the challenges of the nomination and confirmation processes for Supreme Court Justices, and the chapter discusses the crucial powers that the Chief

Justice possesses. Chapter II introduces readers to legal arguments, argument modalities, and judicial philosophies, and the chapter offers a new definition for the terms "legal rhetoric" and provides a new methodology for studying judicial discourse.

The subsequent chapters comprise the core of the study. Chapter III examines Roberts' law review articles and the letters, memoranda, and position papers he wrote while working for the Reagan and Bush administrations, Chapter IV investigates Roberts' appellate court confirmation testimony and his published opinions, and Chapter V investigates Roberts' Supreme Court confirmation testimony and his published opinions. Following a chronological approach reveals that Roberts consistently used certain argument types within corresponding argument modalities to formulate his argumentative strategies, and each chapter demonstrates that Roberts' adhered to a prudentialist interpretive approach to resolve constitutional and statutory questions. Finally, Chapter VI argues that scholars should examine judicial discourse from an interdisciplinary perspective and reevaluate their conceptions about legal rhetoric and rhetorical criticism.

ACKNOWLEDGEMENTS

I would like to thank my committee chair, Dr. Jim Aune, for his sage advice about research, writing, and life as an academician. When I entered graduate school, I saw you as a teacher; as I progressed through the graduate program, you became my mentor; and as I leave the program, I consider you a true friend. I hope that one day my teaching, scholarship, and contributions to the communication and legal fields reflect that the best I have to offer, I owe in large part to you.

I also want to thank my committee members, Dr. Kevin Barge, Dr. Leroy Dorsey, and Dr. Roy Flemming for their valuable comments regarding my dissertation. You offered constructive criticism, challenged me to think about new ideas, and forced me to consider new perspectives. Hopefully, the final project reflects that scholarship can be, and should be, an interdisciplinary and collaborative effort.

Finally, I owe an enormous "thank you" to the two most important people in my life. First, I owe a huge thank you to my wife, Danya Day. Throughout my struggles to finish my dissertation, you always gave me your encouragement, patience, support, wisdom, and most important, your unconditional love. My dissertation is finally complete because of you, and my admiration, appreciation, and respect for you grow stronger every day. Second, I owe a huge thank you to my son, Jackson. You joined me on my excursions to the library, worked with me in my office while I wrote, and sat in on my classes while I taught. Your laughs, hugs, and love during all of those made those

times invaluable and provided me with memories I will always cherish. I'm proud of the young man you've become, and yes, you can now call me Dr. Daddy.

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CHAPTER I

INTRODUCTION: CONFIRMATION BATTLES:

THE STRUGGLE TO SEAT A SUPREME COURT JUSTICE

When Associate Justice Sandra Day O'Connor announced her retirement from the United States Supreme Court on July 1, 2005,[1] *U.S. News & World Report* declared that O'Connor's retirement set the stage for "the coming cataclysm—a political death match over President [George W.] Bush's first nomination to the Supreme Court and the next chapter in the nation's overheated culture wars."[2] Echoing the significance of the

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This thesis follows the style of *Rhetoric & Public Affairs*.

[1] David Rohde and Kenneth Shepsle term the retirement or death of a sitting Justice as a "*nomination-inducing event*." David Rohde and Kenneth Shepsle, "Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court," *Journal of Politics* 69 (2007): 665 (italics in original).

[2] Liz Halloran, Dan Gilgoff, Bret Schulte, and Terence Samuel, "Man of the Hour: John G. Roberts Confounds Liberals and Reassures Conservatives. Wanna Fight?" *U.S. News & World Report*, August 1, 2005, 18. As early as 2001, rumors circulated that both O'Connor and Rehnquist would retire during Bush's presidency. Most commentators agreed that President Bush faced an arduous task in nominating a new Justice for the Court. For example, Stuart Taylor described Bush's nomination opportunity as "the mother of all Senate confirmation battles." Jeff Yates and William Gillespie predicted that Bush would face a "contentious confirmation battle in trying to fill such vacancies on the Court." Kenneth Manning predicted "an epic political struggle." Stephen Martino described the political climate as one in which "the prospect of an ideologically charged, partisan fight looms. In fact, all sides . . . already have begun posturing for a bloody, take-no-prisoners rumble . . . the right itches for a confirmation battle." Brannon Denning predicted a similar environment: "[R]ancorous confirmation battles . . . are also inevitable in the Bush Administration." See Stuart Taylor, Jr., "Courting Trouble," *National Journal*, June 14, 2003, 1832; Jeff Yates and William Gillespie, "Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process," *Washington & Lee Law Review* 58 (2001): 1054; Kenneth L. Manning, Bruce A. Carroll, and Robert A. Carp, "George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?" *Judicature* 85 (2002): 284; Stephen L. Martino, "Change on the Horizon: A Prospective Review of the Nomination and Confirmation Process of the United States Supreme Court," *Washburn Law Journal* 41 (2001): 166; and, Brannon P. Denning, "The 'Blue Slip': Enforcing the Norms of the Judicial Confirmation Process," *William & Mary Bill of Rights Journal* 10 (2001): 75. Viveca Novak reported that the ideological leanings of President Bush's candidates for the

retirement of the key moderate on the Court,[3] and the potential impact her replacement could have on the Court, Jay Sekulow, Chief Counsel of the American Center for Law and Justice, deemed O'Connor's retirement "the most significant Supreme Court resignation and nomination we'll see in our lifetimes."[4] Indeed, since President Ronald Reagan's failed attempt to seat Judge Robert Bork on the Court, the appointment process "has become a public political battleground where groups wage holy war and the tactics reflect a no-prisoners approach to combat."[5] Faced with sagging popularity in public opinion polls[6] and confronted by an increasingly hostile Senate that gained Democratic

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open Court seats would determine "whether the confirmation process is a mere brawl or a full-scale conflagration." Viveca Novak, "Off the Bench? Think the Ashcroft Battle was Ugly? The War Over Our Next Supreme Court Justice Could Start Soon," *Time*, February 26, 2001, 54-55. David Crockett remarked, "Given the reelection of President Bush . . . and [with] two Supreme Court vacancies, the issue of judicial nomination battles shows no sign of being permanently settled." David A. Crockett, "The Contemporary President: Should the Senate Take a Floor Vote on a Presidential Judicial Nominee?" *Presidential Studies Quarterly* 37 (2007): 313.

[3] Most scholars agree that O'Connor gradually became the key moderate Justice and "swing" vote on the Court. See, for example, Thomas R. Hensley, Joyce A. Baugh, and Christopher E. Smith, "The First-Term Performance of Chief Justice John Roberts," *Idaho Law Review* 43 (2007): 627, and Andrew D. Martin, Kevin M. Quinn, and Lee Epstein, "The Median Justice on the United States Supreme Court," *North Carolina Law Review* 83 (2005): 1275-1277. One scholar even referred to the Rehnquist Court as "the O'Connor Court (to emphasize its most decisive member)." See Thomas M. Keck, "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?" *American Political Science Review* 101 (2007): 324.

[4] As quoted in Howard Fineman and Debra Rosenberg, "The Holy War Begins," *Newsweek*, July 11, 2005, 34. Sekulow, also a leading lawyer for the Religious Right, was one of the primary consultants to President Bush who advocated Roberts as the replacement for O'Connor. See Peter Irons, *A People's History of the Supreme Court: The Men and Women Whose Cases have Shaped Our Constitution* (New York: Penguin Books, 2006), 529.

[5] Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005), 6.

[6] President Bush's job approval rating teetered near 40% at the time he nominated Judge Roberts for the Court. See Dan Froomkin, "A Polling Free-Fall among Blacks," *Washington Post*, October 13, 2005,

seats in the 2004 election, President Bush opted for a 'safe' pick for the Court,[7] and on July 19, 2005, he nominated John G. Roberts, Jr.,[8] a federal judge from the U.S. Court of Appeals for the District of Columbia, to replace O'Connor.

President Bush wanted the Senate to move quickly and confirm his candidate for the Court so that it could begin its October term with a full nine members.[9] The Senate

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http://www.washingtonpost.com/wp-dyn/content/blog/2005/10/13/BL2005101300885_pf.html (accessed August 14, 2008). Lorraine Woellert remarked that Roberts' nomination by Bush was "a shrewd gambit by a President who finds himself at political low ebb" and with his "approval ratings at an all-time low," and Benjamin Wittes saw Roberts' nomination take place "during a weak period" of Bush's presidency. See Lorraine Woellert, "Why Not Scalia?" *Business Week*, September 19, 2005, http://www.businessweek.com/magazine/content/ 05_38/b3951059.htm? (accessed August 14, 2008), and Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2007), 2.

[7] A 'safe' candidate for the Supreme Court is "one who is a virtual shoo-in for confirmation. The rationale for such a choice is simple. A president may perceive that the [political] setting is too controversial to permit the appointment of a nominee who would offend a major portion of the political spectrum." See George Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York: HarperCollins College Publishers, 1995), 62. Kenneth Manning and his colleagues, when assessing possible Bush nominees for the Court, predicted that Bush might opt for "a stealth candidate" as a way "to avert a bruising fight" with Congress. See Manning, Carroll, and Carp, "George W. Bush's Potential Supreme Court Nominees?" 284. According to David Greenberg, Bush "made a canny selection in John Roberts—who brandished a sterling resume [sic] a congenial manner, and no hint of scandal in his background." David Greenberg, "The Supreme Court Kabuki Dance," *Wall Street Journal*, July 18-19, 2009, W9.

[8] For a biography on Roberts, see Lisa Tucker McElroy, *John G. Roberts, Jr.: Chief Justice* (Minneapolis, MN: Lerner Publishing Company, 2007); Denis Steven Rutkus and Lorraine H. Tong, *The Chief Justice of the United States* (Hauppauge, N.Y.: Nova Science Publishers, Inc., 2006), 35-40, the chapter on "Nomination of John G. Roberts, Jr.;" and, Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007). For a candid account of the days leading up to Roberts' selection for a seat on the Court, see Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), 185-211, 226-246.

[9] The Supreme Court began its new term on October 3, 2005.

also desired a fully-staffed Court for the new term,[10] so the Senate Judiciary Committee scheduled Roberts' confirmation hearings for Tuesday, September 6. Two days before the start of the hearings, though, Chief Justice William Rehnquist died after his long battle with thyroid cancer. President Bush withdrew Roberts' name as the replacement for O'Connor, and that Monday, September 5, Bush announced that he had selected Roberts, a former law clerk for Rehnquist, to replace the deceased Chief Justice.[11]

Roberts survived his confirmation hearings, and the Judiciary Committee voted 13 to 5 in favor of Roberts' nomination[12] and it sent his name to the floor, where the full Senate voted along partisan lines and confirmed Roberts by a 78 to 22 vote. On September 29, 2005, Associate Justice John Paul Stevens swore in John G. Roberts, Jr., as the 17th Chief Justice of the United States Supreme Court.[13]

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[10] Charles Shipan and Megan Shannon argue that supporters of the president's nominee want to seat the Justice "on the Court as soon as possible, so he or she can start influencing arguments, deliberations, and case decisions." Opponents of the president's nominee, however, "want to delay this process." According to Shipan and Shannon, a protracted confirmation process for a nominee certain to receive Senate approval delays the new Justice from "affecting the Court's policy decisions." See Charles R. Shipan and Megan L. Shannon, "Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations," *American Journal of Political Science* 47 (2003): 656. For more on the president's motives for selecting a candidate for the Court, see David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999).

[11] See, for example, Peter Baker, "Bush Nominates Roberts as Chief Justice; President Seeks Quick Approval with Another Seat Left to Fill," *Washington Post*, September 6, 2005, A01; Judy Keen and Richard Benedetto, "Under Fire, President Attempts to Regain Sense of Equilibrium," *USA Today*, September 6, 2005, 4A; and, Rick Klein, "Bush Picks Roberts for Chief Justice; O'Connor is Likely to Remain for Now," *Boston Globe*, September 6, 2005, A1.

[12] David W. Neubauer and Stephen S. Meinhold, *Battle Supreme: The Confirmation of Chief Justice John Roberts and the Future of the Supreme Court* (Belmont, CA: Thomson Wadsworth, 2006), 53.

[13] The Senate voted largely along party lines: all 55 Republicans voted "aye," as did 22 Democrats and the lone Independent, Vermont's Jim Jeffords. An editorial in the *Wall Street Journal* suggested that "John Roberts should have been confirmed 100-0, but we applaud the 22 Democrats who saw beyong [sic]

While Rehnquist's death certainly marked a saddened moment in America's storied history, his death also provided President Bush with a historic opportunity: the president found himself in the enviable position of having the opportunity to leave his legacy on the Supreme Court by potentially packing it with two conservative Justices.[14]

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ideology and voted aye." See "The Democratic Divide," *Wall Street Journal*, September 30, 2005, A10. Also see Jeanne Cummings and Jess Bravin, "With Roberts In, Bush Looks Ahead," *Wall Street Journal*, September 30, 2005, A3. Perhaps the Democrats who voted in favor of or opposed Roberts' confirmation perceived that seating Roberts on the Court simply would replace one conservative Justice with another conservative Justice. Additionally, perhaps for the 22 Democrats and the 1 Independent Senator who cast their votes for Roberts, his qualifications for the Chief Justice's seat trumped the ideological concerns they may have held.

[14] As Lee Epstein and his colleagues note, "The rule now is that Presidents name Justices who share their political ideology. If Presidents could put themselves on the bench, they would; however, they cannot, so they find the closest possible surrogates." See Lee Epstein, Jeffrey A. Segal, and Chad Westerland, "The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices," *Drake Law Review* 56 (2008): 197. While some scholars dispute a president's ability to pack the Court, Adam Mitzner offers a succinct response: "The argument that presidents lack the opportunity to pack the Court is, simply put, wrong." Adam Mitzner, "The Evolving Role of the Senate in Judicial Nominations," *Journal of Law & Politics* 5 (1989): 406. Also, as Albert Melone suggests, "newly appointed justices . . . can have an immediate impact" on the Court. Albert P. Melone, "The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality," *Judicature* 75 (1991): 79. For more on Court packing, see Stephen Carter, "The Confirmation Mess," *Harvard Law Review* 101 (1988): 1185-1201; Horace Cooper, "Tilting at Windmills: The Troubling Consequences of the Modern Supreme Court Confirmation Process," *Southern University Law Review* 33 (2006): 444; Edward V. Heck and Steven A. Shull, "Policy Preferences of Justices and Presidents: The Case of Civil Rights," *Law & Policy Quarterly* 4 (1982): 327-338; John M. Lawlor, "Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court," *University of Pennsylvania Law Review* 134 (1986): 967-1000; William H. Rehnquist, "Presidential Appointments to the Supreme Court," *Constitutional Commentary* 2 (1985): 319-330; and, Jeffrey A. Segal, Richard J. Timpone, and Robert M. Howard, "Buyer Beware? Presidential Success through Supreme Court Appointments," *Political Research Quarterly* 53 (2000): 557-559. As Henry J. Abraham, one of the leading authorities on the history of the Court, observes, "There is, of course, nothing wrong in a president's attempt to staff the Court with jurists who read the Constitution his way. All presidents have tried to pack the Court, to mold it in their images. Nothing is wrong with this, provided, however, that the nominees are professionally, intellectually, and morally qualified to serve." Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton*, New and rev. ed. (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1999), 328. Albert Melone and his colleagues provide a different assessment on the future of Court packing: "The battle for the Court has been won. To insist upon packing further the Marble Palace with conservatives may unnecessarily jeopardize institutional support for the Court itself."

President Bush initially nominated Harriet E. Miers, his Chief Counsel, to fill the vacancy left by O'Connor's retirement. However, Miers quickly proved to be a divisive choice and her nomination "quickly devolved into political black comedy,"[15] and after mounting criticism from both sides of the political aisle, on October 27, Miers requested that President Bush withdraw her name for consideration on the Court.[16] The president accepted her withdrawal, and on October 31, Bush nominated 3rd Circuit Court of Appeals Judge Samuel A. Alito, Jr., for the open seat on the Court. After a largely conflict-free confirmation hearing, the full Senate confirmed Judge Alito in January.[17]

Albert P. Melone, Alan R. Morris, and Marc-George Pufong, "Too Little Advice, Senatorial Responsibility, and Confirmation Politics," *Judicature* 75 (1992): 192.

[15] Toobin, *The Nine*, 284. Ironically, as Toobin comments, "Miers holds a unique place in the history of the Supreme Court as the only nominee to withdraw her name from consideration by the Senate even though she probably would have been confirmed." For an in-depth discussion of Miers' background and qualifications for the Court, see Toobin, *The Nine*, 284-297. For a candid account of the days and events surrounding Miers' selection for the Court, see Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed. (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008), 319-320, and Greenburg, *Supreme Conflict*, 257-288. For additional discussions of Miers' nomination problems, see Lawrence Baum, *The Supreme Court*, 9th ed. (Washington, D.C.: CQ Press, 2007), 39-40; Kevin J. McMahon, "Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model," *Law & Social Inquiry* 32 (2007): 946-947; and, Christine L. Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush* (Charlottesville: University of Virginia Press, 2007), 136-139, 143.

[16] See Norman Dorsen, "The Selection of U.S. Supreme Court Justices," *International Journal of Constitutional Law* 4 (2006): 653-655.

[17] The Senate confirmed Alito 58 to 42 on January 31, 2006, and he was sworn in by Chief Justice Roberts. For more on Alito's background and history prior to his confirmation to the Court, see Toobin, *The Nine*, 298-300, 311-316. For a candid account of the days leading up to Alito's selection for a seat on the Court, see Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 320-322, and Greenburg, *Supreme Conflict*, 285-315. Also, for a more in-depth look at how Alito might impact the Court, see Akhil Reed Amar, "Criminal Justice," *Pepperdine Law Review* 34 (2007): 522-535, and "Special Edition: Alito Nomination," *Southern University Law Review* 33 (2006): 421-527.

With his nominees successfully seated on the Court, and with the addition of two seemingly conservative Justices added to the Court, President Bush realized his goal of shaping the Supreme Court for the years to come.[18] As Jan Crawford Greenburg notes,

> With the unwitting help of his Democratic opponents, George W. Bush ended up placing two of the most conservative justices on the Supreme Court in years. And together with [Antonin] Scalia and [Clarence] Thomas, the Roberts Court is more conservative than any other in a half century. . . . Although their outlook on the law and the proper role of the Court may be similar to that of Scalia and Thomas, their impact on its direction over the next three to four decades will be more substantial. The Court is now poised to recede from some of the divisive cultural debates. George W. Bush and his team of lawyers will be shaping the direction of American law and culture long after many of them are dead.[19]

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[18] For an excellent analysis of why "a single president can almost never make the Court extreme" and why "[a] single Justice, no matter how extreme, cannot make the Court itself extremist," see Richard D. Friedman, "Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations," *Yale Law Journal* 95 (1986): 1283-1320. For similar views regarding a president's ability to alter the extremity of the Court, see Rehnquist, "Presidential Appointments to the Supreme Court," 319-330; Christopher E. Smith and Kimberly A. Beuger, "Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees," *Akron Law Review* 27 (1993): 115-139; and, Christopher E. Smith and Thomas R. Hensley, "Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush," *Albany Law Review* 57 (1994): 1111-1131. Adam Mitzner, however, offers a response to those holding the view that presidents cannot significantly alter the Court's leanings: "Finally, even where the appointment of one or two associate justices would seemingly have little effect on the Court, it is never clear whether the vacancy at hand will be the last afforded the president, or the first of many. Therefore, the argument that a single appointment is harmless fails because it is never certain that others will not follow." Mitzner, "The Evolving Role of the Senate in Judicial Nominations," 409. When discussing multiple appointments to the Court, Stefanie Lindquist and her colleagues argue that if a president secures the confirmation of more than one Justice for the Court, those Justices must vote as a bloc to influence public policy in a manner consistent with the president's agenda and influence the outcome of a case. See Stefanie Lindquist, David A. Yalof, and John A. Clark, "The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting within Presidential Blocs," *Political Research Quarterly* 53 (2000): 795-814. Regardless of the number of presidential appointments, Tracey George and Lee Epstein argue that the "special relationships" between presidents and sitting Justices often result in "presidential preferences" being written "into particular opinions." See Tracey E. George and Lee Epstein, "On the Nature of Supreme-Court Decision Making," *American Political Science Review* 86 (1992): 325-326. Some scholars even suggest that a new appointment to the Court votes "concordantly" with the president who appointed the Justice, but that tendency declines as the tenure of the Justice increases. See Segal, Timpone, and Howard, "Buyer Beware?" 569.

[19] Greenburg, *Supreme Conflict*, 314-315. Lee Epstein and his colleagues argue that Greenburg's book is "famous for [this] punchline [sic]." See Lee Epstein, Kevin Quinn, Andrew D. Martin, and Jeffrey A.

John G. Roberts, Jr.: The Elusive Court Candidate?

Many Supreme Court watchers agreed that the nomination of John Roberts, first as an Associate Justice and then as the Chief Justice, was a 'safe' pick for the Court. They viewed Roberts as the "stealth candidate,"[20] a Justice David Souter-like nominee

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Segal, "On the Perils of Drawing Inferences about Supreme Court Justices from Their First Few Years of Service," *Judicature* 91 (2008): 169. Many scholars concluded that President Bush's potential nominees could significantly alter the Court. For example, as Stephen Martino suggested, "A change in even one Justice could tip the balance of power," and "[t]he departure of any Justice could unsettle the Court's equilibrium. . . . The confirmation of one or two Justices in the mold of Justices Scalia and Thomas could firmly shift the Court to the right." Martino, "Change on the Horizon," 167, 172-173. Kenneth Manning and his colleagues reached a similar conclusion: "[A] single vacancy could produce a dramatic shift in the ideological direction of future rulings. . . . A departure by any of these [Rehnquist, Stevens, or O'Connor] could have enormous policy consequences." Manning, Carroll, and Carp, "George W. Bush's Potential Supreme Court Nominees," 278. Other scholars offered different assessments. One suggested that since the Court "is conservative on most issues, and moderate on some . . . a George W. Bush presidency is not likely to have any immediate affect on the Court;" instead, a Bush appointment would "preserve" the conservative tilt of the Court rather than "alter the direction of the [C]ourt." Paul Finkelman, "You Can't Always Get What You Want. . .: Presidential Elections and Supreme Court Appointments," *Tulsa Law Journal* 35 (2000): 475. Some scholars even predicted that if Bush appointed a Justice, the Court would shift to the left rather than to the right. See Martin, Quinn, and Epstein, "The Median Justice," 1275-1322. Both of these scholars' studies, however, did not consider the shift-implications for the Court if President Bush seated two Justices on the Court.

[20] Joyce Baugh defines "stealth" candidates as "individuals who share [the president's] ideological perspectives but lack a 'paper trail' of controversial writings and speeches." Joyce A. Baugh, *Supreme Court Justices in the Post-Bork Era: Confirmation Politics and Judicial Performance* (New York: Peter Lang, 2002), 4. Regarding both Democratic and Republican fears that Roberts, too, was a stealth candidate, Cathleen Kaveny wrote: "Liberals worry that Roberts is a stealth Antonin Scalia. Conservatives worry that he is a stealth David Souter." Cathleen Kaveny, "The Martyrdom of John Roberts," *Commonweal*, September 9, 2005, 7. One scholar, however, suggests, "David Souter's 'stealth' nomination to the Court cast a shadow over the [selection] process. . . . This raises the question of whether the possibility for such stealth nominations has decreased." See Nemacheck, *Strategic Selection*, 143-144. Much scholarship exists that critiques the 'stealth' nomination strategy. One criticism centers on the competency of the nominee. Michael Comiskey argues that "the modern confirmation process" involves the search for nominees' "paper trails," which actually "discourages presidents from nominating especially able figures who have thought and written much about legal issues." Michael Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees* (Lawrence: University Press of Kansas, 2004), 85. Sharing the same concern, as two other scholars suggest, "The politicization of the confirmation process has also created an incentive for the president to select nominees whose paper record will not excite serious

lacking a lengthy paper trail that might potentially derail his confirmation during the Senate Judiciary Committee hearings, as occurred with President Reagan's selection of Robert Bork.[21] Bork's paper trail included an abundance of controversial articles he penned and speeches he delivered, which thereby provided Senators with a vast corpus

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opposition or who have no paper record at all." See Norman Vieira and Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* (Carbondale: Southern Illinois University Press, 1998), 251. Also see David R. Strauss and Cass R. Sunstein, "The Senate, the Constitution, and the Confirmation Process," *Yale Law Journal* 101 (1992): 1492. A second criticism of the "stealth strategy," according to Albert Melone and his colleagues, is that nominating a perceived stealth candidate for the Court "does nothing for maintaining judicial impartiality . . . nor supports the principle of judicial independence." Melone, Morris, and Pufong, "Too Little Advice," 188. For additional criticisms relating to stealth nominees, see Richard Davis, "Supreme Court Nominations and the News Media," *Albany Law Review* 57 (1994): 1063. On the value of a nominee's paper trail and the subsequent questioning about the nominee's "speeches and writings and expert analysis of those speeches and writings," see Gary J. Simson, "Mired in the Confirmation Mess [book review essay]," *University of Pennsylvania Law Review* 143 (1995): 1045. Additional discussions include Elena Kagan, "Confirmation Messes, Old and New [book review essay]," *University of Chicago Law Review* 62 (1995): 937; Melone, "The Senate's Confirmation Role in Supreme Court Nominations," 79; William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review* 62 (1987): 167; and, Nadine Strossen, "The Constitutional Litmus Test," *American Prospect* 14 (1993): 99-105.

[21] George Watson and John Stookey explain the rationale behind Justice Souter's nomination to the Court: "Dubbed the 'stealth nominee' because so few people knew anything about him and having virtually no paper trail to link him one way or another to key issues, Souter represented a reasonably safe nominee in a setting not particularly favorable for the president." Watson and Stookey, *Shaping America*, 63. Souter earned the label 'stealth candidate' since he had "written no books, no appellate court opinions, and one law review article." "Succeeding Souter," *Wall Street Journal*, May 2-3, 2009, A10. On Souter as a stealth candidate, see Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* (New York: Oxford University Press, 2005), 94-116. Aptly, Yarbrough titles chapter three, "Stealth Candidate." For more on the Souter nomination, see Michael Comiskey, "Can the Senate Examine the Constitutional Philosophies of Supreme Court Nominees?" *PS: Political Science and Politics* 26 (1993): 495-500; Comiskey, *Seeking Justices*, 10; Halloran, Gilgoff, Schulte, and Samuel, "Man of the Hour," 18; Thomas M. Keck, "David H. Souter: Liberal Constitutionalism and the Brennan Seat," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz, 185-215 (Lawrence: University Press of Kansas, 2003), especially "The 'Stealth Nominee' Joins the Court," 186-189; and, Vieira and Gross, *Supreme Court Appointments*, 193-199.

of artifacts from which they could discern Bork's judicial temperament.[22] Roberts, on the other hand, largely remained an enigma with respect to any significant paper trail. As Hermann Schwartz, a law professor at American University, noted, Roberts "doesn't make speeches. He doesn't write articles."[23] One reporter following the president's selection of Roberts concluded, "Bush placed a premium on choosing a conservative without an extensive or controversial trail of writings and speeches that can be dissected

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[22] For more on Bork, his judicial philosophy, and his confirmation hearings, see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990); Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: Union Square Press, 2007); David P. Bryden, "How to Select a Supreme Court Justice: The Case of Robert Bork," *American Scholar* 57 (1988): 201-217; Stephen L. Carter, "Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice," *Texas Law Review* 69 (1991): 759-793; David J. Danelski, "Ideology as a Ground for the Rejection of the Bork Nomination," *Northwestern University Law Review* 84 (1990): 900-920; Dennis DeConcini, "The Confirmation Process," *St. John's Journal of Legal Commentary* 7 (1991): 1-13; Bruce Fein, "A Circumscribed Senate Confirmation Role," *Harvard Law Review* 102 (1989): 672-687; Mark Gitenstein, *Matters of Principle: An Insiders Account of America's Rejection of Robert Bork's Nomination to the Supreme Court* (New York: Simon & Schuster, 1992); Greenburg, *Supreme Conflict*, 48-52; Stephen M. Griffin, "Politics and the Supreme Court: The Case of the Bork Nomination," *Journal of Law & Politics* 5 (1989): 551-604; Lawrence C. Marshall, "Intellectual Feasts and Intellectual Responsibility," *Northwestern University Law Review* 84 (1990): 832-850; Thomas B. McAffee, "The Role of Legal Scholars in the Confirmation Hearings for Supreme Court Nominees—Some Reflections," *St. John's Journal of Legal Commentary* 7 (1991): 211-244; Gary L. McDowell, "The War for the Constitution," *Wall Street Journal*, October 23, 2007, A19; Patrick B. McGuigan and Dawn M. Weyrich, *Ninth Justice: The Fight for Bork* (Washington, D.C.: Free Congress Foundation, 1990); Robert F. Nagel, "Advice, Consent, and Influence," *Northwestern University Law Review* 84 (1990): 858-875; Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: The Johns Hopkins University Press, 2005), 161-189; Lori J. Owens, *Original Intent and the Struggle for the Supreme Court: The Politics of Judicial Appointments* (Lewiston, NY: The Edwin Mellen Press, 2005), 99-146; Michael Pertschuk and Wendy Schaetzel, *The People Rising: The Campaign Against the Bork Nomination* (New York: Thunder's Mouth Press, 1989); Scott R. Ryther, "Advice and Consent: The Senate's Political Role in the Supreme Court Appointment Process," *Utah Law Review* 1988 (1988): 411-433; and, Vieira and Gross, *Supreme Court Appointments*. For selected transcripts from the hearings that include Senators' questions and Bork's answers, see Ralph E. Shaffer, ed. *The Bork Hearings: Highlights from the Most Controversial Judicial Confirmation Battle in U.S. History* (Princeton, N.J.: Markus Wiener Publishers, 2005).

[23] As quoted in Halloran, Gilgoff, Schulte, and Samuel, "Man of the Hour," 20.

and attacked by critics."[24] For many observers, then, it appeared that Roberts could survive the scrutiny of the confirmation hearings in the post-Bork era of Supreme Court politics.

Other Court watchers, however, disagreed with the assessment of Roberts as a stealth candidate. Several noted that Roberts "brings with him solid conservative credentials and a paper trail on abortion and civil liberties that will give opponents ammunition in a confirmation battle."[25] Responding to President Bush's announcement of nominating Roberts for Chief Justice, Senate Judiciary Committee member Edward M. Kennedy, a Democrat from Massachusetts, commented that after reading "the limited available parts of his record" Senators had "serious concerns about his role in the 1980s in seeking to weaken voting rights, roll back women's rights, and impede our progress toward a more equal nation."[26] Ultimately, however, no one discovered a 'smoking gun' that could significantly affect Roberts' confirmation, so prior to the hearings Roberts appeared certain to avoid a Bork- or Clarence Thomas-like interrogation by the Judiciary Committee.

Roberts' qualifications for the High Court, though, did pose a problem for many who had anticipated President Bush's selection for a Chief Justice. Both Democrats and Republicans "could barely hide their disappointment with Roberts' lack of a red-meat

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[24] Kenneth T. Walsh, "The President's Shrewd Surprise," *U.S. News & World Report*, August 1, 2005, 20.

[25] Susan Page and Kathy Kiely, "Praise on One Side; Questions on the Other," *USA Today*, July 20, 2005, 6A.

[26] As quoted in Klein, "Bush Picks Roberts for Chief Justice," A1.

résumé."[27] Some critics focused on Roberts' limited adjudicative experience, noting that Roberts "had only two years as a judge under his belt before getting the nod for the high court, following years in private practice,"[28] though other observers found that Roberts had "a sterling record as a lawyer"[29] and that he possessed "outstanding legal qualifications."[30] Indeed, Roberts' academic, political, and judicial pedigree justifies his supporters' claims: Roberts graduated *summa cum laude* from Harvard University and *magna cum laude* from Harvard Law School; during the Reagan administration he served in the Justice Department as Special Assistant to the Attorney General and in the White House Counsel's office as Associate Counsel to the President, and during the George H. W. Bush administration he served in the Justice Department as Principal Deputy Solicitor General; he held judicial clerkships with the Second Circuit Court's Judge Henry J. Friendly and with Associate Supreme Court Justice Rehnquist; and, Roberts successfully litigated with the Washington D.C. firm Hogan & Hartson, during which time he argued 39 cases before the Supreme Court.[31] As Roberts' confirmation hearings grew closer, opinion polls revealed that the majority of the public found

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[27] Evan Thomas and Stuart Taylor, Jr., "Judging Roberts," *Newsweek*, August 1, 2005, 24.

[28] Jess Bravin, "What Résumé Does a Justice Really Need?" *Wall Street Journal*, October 28, 2005, A5.

[29] Dorsen, "The Selection of U.S. Supreme Court Justices," 654.

[30] Lee Epstein, René Lindstädt, Jeffrey A. Segal, and Chad Westerland, "The Changing Dynamics of Senate Voting on Supreme Court Nominees," *Journal of Politics* 68 (2006): 297. Also see Lincoln Caplan, "Litmus Tests," *Legal Affairs* 4 (2005): 1.

[31] See Toobin, *The Nine*, 262-264. Also see Hensley, Baugh, and Smith, "The First-Term Performance," 628, and Neubauer and Meinhold, *Battle Supreme*, 3-4.

Roberts qualified to hold the position of Chief Justice,[32] so the experience and qualifications' debate became moot points on which to attack the president's candidate for the Court.

With little else on which to thwart the president's selection for a new Chief Justice, Judge Roberts' confirmation hearings began without a cloud of controversy hovering above his head. Consequently, as *Newsweek* predicted, "Roberts seems destined to be confirmed without the kind of stormy melodrama that boosts cable-TV ratings and fills the coffers of activist groups in Washington."[33] Perhaps, then, Roberts' appearance and testimony before the Senate Judiciary Committee would provide candid insight about the man nominated for the Chief Justice's position.

The Confirmation Hearings: An Exercise in Futility?

There is little doubt that the confirmation hearings that take place before the Senate Judiciary Committee serve a vital purpose in America's democratic system.[34] While the Constitution grants power to the president to appoint Justices to the Supreme

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[32] See Neubauer and Meinhold, *Battle Supreme*, 16-17.

[33] Thomas and Taylor, Jr., "Judging Roberts," 24.

[34] See, for example, Comiskey, *Seeking Justices*, 35-39; Trevor Parry-Giles, *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process* (East Lansing: Michigan State University Press, 2006); Trevor Parry-Giles, "To Produce a 'Judicious Choice': Presidential Responses to the Exercise of Advice and Consent by the U.S. Senate on Supreme Court Nominations," in *The Prospect of Presidential Rhetoric*, ed. James Arnt Aune and Martin J. Medhurst, 99-129 (College Station: Texas A&M University Press, 2008); and, Ruth Bader Ginsburg, "Confirming Supreme Justices: Thoughts on the Second Opinion Rendered by the Senate," *University of Illinois Law Review* 1988 (1988): 101-117.

Court, the Constitution also delegates to the Senate the role of "advice and consent."[35] The Senate's constitutional charge, therefore, allows the legislative branch to serve as a check on the executive branch's appointment power for seats on the nation's highest court in the judicial branch.

During the early twentieth century, though, even when exercising its 'advice and consent' role, Senators traditionally deferred to the president's prerogative in appointing a new member for the Court.[36] In fact, prior to 1954, the Senate Judiciary Committee

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[35] United States Constitution, Article II, §2, clause 2. For excellent discussions on the historical grounds for clause 2 and the advice and consent process, see W. William Hodes, "The Overtly 'Political' Character of the Advise and Consent Function: Offsetting the Presidential Veto with Senatorial Rejection," *St. John's Journal of Legal Commentary* 7 (1991): 109-125; Strossen, "The Constitutional Litmus Test," 99-105; and, Adam J. White, "Toward the Framers' Understanding of 'Advice and Consent': A Historical and Textual Inquiry," *Harvard Journal of Law and Public Policy* 29 (2005): 103-148. On the importance of the Senate's role in the advising and consenting process, see Joseph R. Biden, "The Constitution, the Senate, and the Court," *Wake Forest Law Review* 24 (1989): 951-958; DeConcini, "The Confirmation Process," 1-13; Ronald W. Eades, "Judicial Nominations: A Cooperative Effort," *St. John's Journal of Legal Commentary* 7 (1991): 93-103; G. Calvin Mackenzie, *The Politics of Presidential Appointments* (New York: Free Press, 1981); Matthew Madden, "Anticipated Judicial Vacancies and the Power to Nominate," *Virginia Law Review* (93 (2007): 1135-1174; Albert P. Melone, "Judicial Discretion and the Senate's Role in Judicial Selection: Questioning Supreme Court Nominees," *Southern Illinois University Law Journal* 16 (1992): 557-579; Michael Stokes Paulsen, "Straightening Out *The Confirmation Mess* [book review]," *Yale Law Journal* 105 (1995): 549-579; Denis Steven Rutkus, ed., *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate* (Hauppauge, N.Y.: Nova Science Publishers, Inc., 2005); Paul M. Simon, "Advice and Consent: The Senate's Role in the Judicial Nomination Process," *St. John's Journal of Legal Commentary* 7 (1991): 41-47; Nadine Strossen, "Supreme Court Nominations; Yes: A Solemn Duty," *American Bar Association Journal* 79 (1993): 42; and Laurence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985), 125-141.

[36] As Mark Silverstein notes, the nomination and confirmation process traditionally followed a "politics of acquiescence." Mark Silverstein, "Bill Clinton's Excellent Adventure: Political Development and the Modern Confirmation Process," in *The Supreme Court in American Politics*, ed. Howard Gillman and Cornell Clayton, 133-147 (Lawrence: University Press of Kansas, 1999), 136. While Senators may have opposed a president's nominee for the Court, they expressed their opposition through their votes before the full Senate rather than requiring nominees to appear before the Judiciary Committee. Also see Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (New York: W.W. Norton, 1994).

rarely requested that a nominee for the Court appear before the Committee.[37] Two important events, however, significantly altered both the nomination and the confirmation processes.

The first major event that changed the processes resulted from the Supreme Court's 1954 landmark decision in *Brown* v. *Board of Education*[38] that banned segregation. Largely due to the conservative Southern Democrats on the Committee and their disapproval with the Court's decision, Senators wanted to scrutinize more thoroughly candidates for the Court. Future nominees, therefore, began regularly appearing before the Committee. More importantly, however, the post-*Brown* confirmation hearings ushered in the Committee practice of questioning nominees on their views toward the Constitution and their views on particular Court decisions, two areas traditionally considered outside the purview of the confirmation hearings process.[39]

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[37] According to William Ross, the "first personal appearance by a nominee" before the Judiciary Committee took place in 1925, when Attorney General Harlan F. Stone briefly testified to respond to "charges of impropriety." Appearances and testimony before the Committee became "a regular feature of the nomination process" 25 years later, or after the *Brown* decision. See Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings," 116, 117. Also see Greenberg, "The Supreme Court Kabuki Dance," W9. Other scholars suggest that regular testimony before the Committee began after Justices Felix Frankfurter and William O. Douglas appeared before the Committee in 1939. See David R. Dow and Richard A. Westin, "What We Should Learn from the Hill vs. Thomas Fiasco," *St. John's Journal of Legal Commentary* 7 (1991): 86, and E. Stewart Moritz, "'Statistical Judo': The Rhetoric of Senate Inaction in the Judicial Appointment Process," *Journal of Law & Politics* 22 (2006): 351. For an account that traces the origins of the significant changes to the nomination and confirmation processes beginning with President Woodrow Wilson's nomination of Louis D. Brandeis in 1916, see Parry-Giles, *The Character of Justice*.

[38] 347 U.S. 483 (1954).

[39] See Comiskey, *Seeking Justices*, 6-7, and John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: The Johns Hopkins University Press, 1995), 109.

The second major event that changed the processes resulted from a series of rather surprising events: three speeches delivered by Edwin Meese, the Attorney General for the Reagan administration.[40] Appointed to his post in 1984, Meese delivered a controversial speech before the American Bar Association on July 9, 1985.[41] In his speech, Meese discussed the position held by the Reagan administration, which supported a "jurisprudence of original intention," or a view of the Constitution in which Justices should take "the words of the document to mean now what they meant in the eighteenth century," as drafted and written by the Framers.[42] In his address, Meese criticized the Supreme Court's liberal decisions in the areas of federalism, criminal law, and religion, respectively.[43] On July 17, 1985, Meese delivered a similar speech in

[40] For an excellent discussion of the three speeches and Meese and Brennan's views on the Constitution, see Lino A. Graglia, "How the Constitution Disappeared," *Commentary*, February 1986, 19-27, and Jonathan K. Van Patten, "The Partisan Battle over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification," *Marquette Law Review* 70 (1987): 389-422.

[41] See Edwin Meese, III, "The Great Debate: [Speech] Before the American Bar Association," July 9, 1985, http://www.fed-soc.org/resources/id.49/default.asp (accessed May 20, 2008). On Meese's views on original intent, see Edwin Meese, III, "The Battle for the Constitution," *Policy Review* 35 (1985): 32-35. For criticisms of Meese's views, see Antony T. Podesta, "Letter: Good Intentions," *Policy Review* 35 (1985): 85-86. For an excellent account of President Ronald Reagan's administrative initiatives and the subsequent controversy created by Meese's support of the initiatives, see Craig R. Smith, "Reagan on Civil Rights: Returning to Strict Construction of the Constitution," in *Civil Rights Rhetoric and the American Presidency*, ed. James Arnt Aune and Enrique D. Rigsby, 198-230 (College Station: Texas A&M University Press, 2005).

[42] Martin Mayer, *The Judges* (New York: St. Martin's Press, 2006), 368. Also see Belz, *A Living Constitution or Fundamental Law?* 248-250.

[43] Meese, III, "The Great Debate: [Speech] Before the American Bar Association." Also see Owens, *Original Intent and the Struggle for the Supreme Court*, 38.

London, England, before the American Bar Association.[44] Meese's speeches "ignited a firestorm" and Associate Justice William J. Brennan delivered a speech at Georgetown University on October 12 in which he "responded vigorously" to Meese's criticism of the Court.[45] Brennan described the 'original intention' view as "little more than arrogance cloaked as humility" and he defended how the Justices' interpreted and used the Constitution's text in their decision-making.[46] Not to be outdone by a member of the Court, Meese responded to Brennan's speech with a speech of his own a month later, on November 15.[47] The oratorical debate did not remain limited to Meese and Brennan; the content of their speeches generated a larger debate in the legal community over the appropriate approaches to constitutional interpretation, especially approaches that involved deference to the doctrine of 'original intention.' More importantly, however, the exchange between Meese and Brennan mobilized Congress, and the debate foreshadowed the partisan climate that any Reagan nominees to the Court would face. President Reagan soon discovered how extensive the fallout from Meese's speech would be.

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[44] See Edwin Meese, III, "Address of the Honorable Edwin Meese III, Attorney General of the United States Before the American Bar Association," Department of Justice, London, England, July 17, 1985.

[45] Owens, *Original Intent and the Struggle for the Supreme Court*, 41-42. See especially chapter 2, "Meese Versus Brennan," 37-75.

[46] See William J. Brennan, Jr., "The Great Debate: [Speech] To the Text and Teaching Symposium, Georgetown University," October 12, 1985, http://www.fed-soc.org/resources/id.50/default.asp (accessed May 20, 2008).

[47] See Edwin Meese, III, "The Great Debate: [Speech] Before the D.C. Chapter of the Federalist Society Lawyers Division," November 15, 1985, http://www.fed-soc.org/resources/id.52/default.asp (accessed May 20, 2008).

In 1987, President Reagan had a third opportunity to fill a Court vacancy,[48] and he nominated Judge Robert Bork from the U.S. Court of Appeals for the District of Columbia for the open seat on the Court. The Judiciary Committee seized the opportunity to vet Bork's résumé. The Senators uncovered a 'paper trail' of controversial opinions, speeches, and writings on which Committee members could focus their attention during Bork's confirmation hearing. The Committee quickly demonstrated through its questioning that Bork, sounding like a clone of Meese, adhered to an 'original intention' approach to resolving constitutional questions, and with the Judiciary Committee's recommendation against seating Bork on the Court, the full Senate resoundingly rejected Bork's nomination.

As a consequence of the Meese/Brennan debate, the Bork confirmation hearings added two new dimensions to the Judiciary Committee's practices that further expanded upon the post-*Brown* changes. The first change involved the Committee's exercise of questioning nominees not only on their views toward the Constitution, but also on their judicial philosophy as it relates to how they interpret the Constitution. The second, and more important, change involved not simply questioning nominees on their views on particular Court decisions, but widening the scope to include questions to elicit answers on how a nominee would resolve particular issues that came before the Court. In other words, Senators wanted to know how the nominee would cast a vote on a case before the

[48] Reagan's previous Court nominees included the 1981 nomination of Sandra Day O'Connor (confirmed) and the 1986 nomination of Antonin Scalia (confirmed). Reagan also elevated Justice William Rehnquist to the Chief Justice's seat upon the retirement of Warren Burger in 1986. Justice Scalia took Rehnquist's seat on the Court.

Court. While scholars concur that the Committee's inquiry process gradually changed further throughout the twentieth century, the majority of scholars agree that the Bork hearings ushered in a new manner in which Senators questioned nominees during the confirmation hearings.[49]

[49] Many scholars contend that the Bork hearings changed the focus from a nominee's competency and qualifications for sitting on the Court to a focus on the nominee's judicial and/or political ideology. For example, as G. Calvin Mackenzie described the event, "The turning point [in nominations] came with the Senate rejection of Robert Bork's nomination to the Supreme Court…This was nothing less than scorched-earth politics and it changed the rules of the game in judicial appointments." G. Calvin Mackenzie, "Starting Over: The Presidential Appointment Process in 1997," *A Twentieth Century Fund/Century Foundation White Paper, The Twentieth Century Fund Foundation*, 1998: 20. John Frank notes that the Bork hearings were "truly important in the history of Supreme Court appointments because it was the first out-and-out examination of ideology." John Frank, "Are the Justices Quasi-Legislators Now?" *Northwestern University Law Review* 84 (1990): 924. Jan Crawford Greenburg offers a similar view: "The battle over Robert Bork redefined and reshaped the Senate confirmation process and influenced the decisions of future presidents and the preparation of future nominees." Greenburg, *Supreme Conflict*, 52. According to John Felice and Herbert Weisberg, "the Bork proceedings opened the doors for intensive screening and questioning of future candidates' judicial philosophies and ideological beliefs." John D. Felice and Herbert F. Weisberg, "The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees, 1953-1988," *Kentucky Law Journal* 77 (1988-1989): 510. For a discussion on the resultant changes to the confirmation and nomination criteria as a result of the Bork hearings, see Epstein, Lindstädt, Segal, and Westerland, "The Changing Dynamics of Senate Voting on Supreme Court Nominees," 296-307; Parry-Giles, *The Character of Justice*; and, Vieira and Gross, *Supreme Court Appointments*, 247-254. There are scholars, however, who disagree with the claims that Bork's confirmation hearings significantly altered the confirmation hearings' process and the confirmation criteria. James Gauch, for example, notes, "Although many decried the injection of politics into Robert Bork's nomination and rejection in 1987, political attacks on judicial nominees are nothing new." James E. Gauch, "The Intended Role of the Senate in Supreme Court Appointments," *University of Chicago Law Review* 56 (1989): 337. Elena Kagan shares a similar perspective: "That so-called [confirmation] mess . . . ended right after it began, with the defeat of the nomination of Robert Bork," and "[t]he problem is not that the Bork hearings have set a pattern for all others; the problem is that they have not." Kagan, "Confirmation Messes, Old and New," 929, 942. Also see Frank Guliuzza III, Daniel J. Reagan, and David M. Barrett, "Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?" *Marquette Law Review* 75 (1992): 405-437, and Frank Guliuzza III, Daniel J. Reagan, and David M. Barrett, "The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria," *Journal of Politics* 56 (1994): 773-787. While the post-Bork debate continues, two scholars conclude that faced with a potential confirmation battle, a "president's action on judicial nominations may be influenced by the post-Bork confirmation atmosphere, even when the prospects for confirmation are generally favorable." Vieira and Gross, *Supreme Court Appointments*, 254.

Clearly, the post-*Brown* and post-Bork confirmation hearings significantly differ from the confirmation practices of the early twentieth century. Today, every candidate for the Court must appear before the Senate Judiciary Committee,[50] engage in several days of often adversarial hearings where Senators interrogate the nominee and the nominee offers testimony before the inquisitors, and then hope the Committee submits the nominee's name to the floor of the Senate for a confirmation vote.[51] The disappearance of 'presidential deference' and the appearance of 'congressional distrust' now loom large in the effort to seat new Justices on the Court.[52]

In fact, the political climate for potential nominees remains less than friendly. As Judge Clarence Thomas quickly discovered, confirmation hearings can rapidly digress into a character inquisition (or assassination, depending on one's political ideology).[53]

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[50] Margaret Williams and Lawrence Baum describe a nominee's appearance before the Committee as "the heart of the confirmation process." Margaret Williams and Lawrence Baum, "Questioning Judges about Their Decisions: Supreme Court Nominees before the Senate Judiciary Committee," *Judicature* 90 (2006): 74.

[51] If the Judiciary Committee votes to approve a nominee, it automatically sends that nomination to the full Senate for a vote. The Committee also may vote that it does not approve of the nominee, and the Committee then has the option of either sending or not sending the nomination to the full Senate for a vote. See Bryon J. Moraski and Charles R. Shipan, "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices," *American Journal of Political Science* 43 (1999): 1092. For alternative submission processes that involve the use of the blue slip, or the deference to the approval or disapproval recommendation from the senator from a nominee's home state, see Denning, "The 'Blue Slip,'" 75-101, and Brannon P. Denning, "The Judicial Confirmation Process and the Blue Slip," *Judicature* 85 (2002): 218-226.

[52] See, for example, Yvette M. Barksdale, "Advise and Consent," *Case Western Law Review* 47 (1997): 1399. Barksdale argues that while the Senate still follows the "current standard of deference to presidential nominees," she notes that senators will oppose nominees who are extremely partisan (too conservative or too liberal) and/or extremely ideological.

[53] For scholarship on Clarence Thomas' nomination and subsequent confirmation troubles, see Dow and Westin, "What We Should Learn from the Hill vs. Thomas Fiasco," 81-91; J. James Exon, "Is a

And while not all subsequent Court nominees suffered through similar Thomas-like hearings, the reality is that in the twenty-first century, the Supreme Court—and seats on it—has become "a political battle ground."[54] The majority of scholars continually conclude that the Senate has abdicated its 'advice and consent' role and replaced it with an 'admonition and refusal' role. For example, consider how legal scholars characterize the current confirmation process: one describes it as "a political donnybrook,"[55] another

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'Philosophically Balanced' Supreme Court Possible?" *St. John's Journal of Legal Commentary* 7 (1991): 25-29; Charles E. Grassley, "The Judicial Nomination Process," *St. John's Journal of Legal Commentary* 7 (1991): 31-39; Martin Shefter, "Institutional Conflict over Presidential Appointments: The Case of Clarence Thomas," *PS: Political Science and Politics* 25 (1992): 676-679; Simon, "Advice and Consent," 41-47; and, Christopher E. Smith, *Critical Judicial Nominations and Political Change: The Impact of Clarence Thomas* (Westport, CT: Praeger, 1993). On calls to reform the confirmation process as a result of the Thomas hearings, see Donald P. Judges, "Confirmation as Consciousness Raising: Lessons for the Supreme Court from the Clarence Thomas Confirmation Hearings," *St. John's Journal of Legal Commentary* 7 (1991): 147-177, and Theodore B. Olson, "The Thomas Hearings, Confirmations and Congressional Ethics," *St. John's Journal of Legal Commentary* 7 (1991): 245-255.

[54] Mary Katherine Boyte, "The Supreme Court Confirmation Process in Crisis: Is the System Defective, or Merely the Participants?" *Whittier Law Review* 14 (1993): 544. Despite the views of many Court watchers regarding President George W. Bush's potential nominees, with most Court nominations, the majority of senators, regardless of their political party, do not want to "engage in political bloodletting over Supreme Court nominations." See Comiskey, "Can the Senate Examine the Constitutional Philosophies of Supreme Court Nominees?" 495.

[55] Davis, "Supreme Court Nominations and the News Media," 1066. Stephen Martino terms the constitutionally-stipulated nomination and confirmation process "a Beltway two-step." Martino, "Change on the Horizon," 165. William Bradford Reynolds concurs, and he notes, "Judicial appointments (like many others) have thus become political free-for-alls, with . . . little meaningful examination of the nominee." William Bradford Reynolds, "Revisiting the Confirmation Process Only to Find It in the Same State of Disrepair," *Judicature* 75 (1992): 228. Perhaps Davis' claim alludes to President George H.W. Bush's nomination of Clarence Thomas for the Court in 1991. Referring to Bush's efforts to pack the Court with conservative Justices, Leslie Gelb stated, "No President has the right to transform the Court into an ideological hit squad." Leslie Gelb, *New York Times*, October 13, 1991, E15. Also see John Anthony Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process under Bill Clinton and George W. Bush," *Journal of Appellate Practice and Process* 5 (2001): 1-28.

calls it "the political circus,"[56] and yet another deems the process "confirmation-by-litmus test."[57] Some scholars even suggest that today's confirmation hearings amount to little more than Senators attempting "to 'catch' the nominee" making a statement during

[56] Gerald Walpin, "Take Obstructionism Out of the Judicial Nominations Confirmation Process," *Texas Review of Law & Politics* 8 (2003): 90. Calvin Massey offers a similar assessment of the process, and notes, "politics are at the heart of the confirmation process. There is no way to drain the politics from this swamp." Calvin R. Massey, "Getting There: A Brief History of the Politics of Supreme Court Appointments," *Hastings Constitutional Law Quarterly* 19 (1991): 16. Also see David M. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* (New York: Priority Press Publications, 1988).

[57] William Bradford Reynolds, "The Confirmation Process: Too Much Advice and Too Little Consent," *Judicature* 75 (1991): 80. Much has been written on the Senate's role in the confirmation process. Some Court scholars support the position that Barbara Perry and Henry Abraham advocate: "[A] candidate's merit should be the primary criterion for selection to the Supreme Court." Barbara A. Perry and Henry J. Abraham, "A 'Responsive' Supreme Court? The Thomas, Ginsburg, and Breyer Appointments," *Judicature* 81 (1998): 165. Other scholars believe that "[i]f nominees refuse to answer legitimate questions, then senators need not confirm them." Melone, Morris, and Pufong, "Too Little Advice," 189. Other scholars oppose litmus tests for nominees. As one suggests, "Perhaps some substantial changes are in order to increase the focus of attention on Supreme Court nominees' legal skills and capacities rather than their abilities to surpass whatever prevailing litmus test is being promoted at the moment." Robert C. Bradley, "Who are the Great Justices and What Criteria Did They Meet?" in *Great Justices of the U.S. Supreme Court: Ratings & Case Studies*, ed. William D. Pederson and Norman W. Provizer, 1-31 (New York: Peter Lang, 1993), 23. Even one of the longest-serving members of the Judiciary Committee, Senator Joseph Biden, advises that "the Senate must not apply litmus tests of its own. No party to the process of naming federal judges has any business attempting to foreclose upon the future decisions of the nominees." Biden, "The Constitution, the Senate, and the Court," 954. Ironically, however, the Committee seems prone to engaging in the type of questioning that Biden criticizes, where nominees must navigate treacherous litmus test subjects such as abortion, affirmative action, economic rights, environmental protection, and federal powers. Law professor Charles Black alludes to these subjects as "the large issues of the day," and he argues that the Senate should inquire into a nominee's "views" on these issues, especially if holding particular views "will make it harmful to the country for him to sit and vote on the Court . . ." See Charles L. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," *Yale Law Journal* 79 (1970): 657. For more on litmus tests, see Bruce Fein, "Supreme Court Nominations; No: Don't Get Down to Cases," *American Bar Association Journal* 79 (1993): 43; John Paul Jones, "Making Judicial Nominees Answer Senate Questions," *St. John's Journal of Legal Commentary* 7 (1991): 139-145; Jon O. Newman, "Probing Views and Allegations in the Confirmation of Federal Judges," *St. John's Journal of Legal Commentary* 7 (1991): 15-24; Roger Pilon, "How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees," *Policy Analysis*, August 6, 2002: 1-18; and, Watson and Stookey, *Shaping America*.

the hearings that "reveals a belief so extreme" that the nominee poses an imminent danger to the public if seated on the Court.[58] Court nominees now encounter a Senate that in its confirmation voting "deemphasizes ethics, competence, and integrity and stresses instead politics, philosophy, and ideology,"[59] or what Professor of Law Stephen

[58] Strauss and Sunstein, "The Senate, the Constitution, and the Confirmation Process," 1491. As another scholar notes, "senators questioning candidates for the Court have repeatedly asked whether they would 'follow the Constitution' and precedent, even though no consensus has existed as to what 'following the Constitution' means." Stephen E. Gottlieb, "The Rehnquist Court (1986-[2005]): Radical Revision of Constitutional Law," in *The United States Supreme Court: The Pursuit of Justice*, ed. Christopher Tomlins, 327-356 (Boston: Houghton Mifflin Company, 2005): 331.

[59] Epstein, Lindstädt, Segal, and Westerland, "The Changing Dynamics of Senate Voting on Supreme Court Nominees," 296. Many legal scholars have written on the problems with the nomination and confirmation processes. See, for example, Sarah A. Binder, "The Senate as a Black Hole? Lessons Learned from the Judicial Appointments Experience," in *Innocent until Nominated: The Breakdown of the Presidential Appointments Process*, ed. G. Calvin Mackenzie, 173-195 (Washington, D.C.: Brookings Institution Press, 2001); Stephen L. Carter, "Why the Confirmation Process Can't be Fixed," *University of Illinois Law Review* 1993 (1993): 1-19; Davis, "Supreme Court Nominations and the News Media," 1061-1079; Friedman, "Tribal Myths," 1316-1318; Paul A. Freund, "Appointment of Justices: Some Historical Perspectives," *Harvard Law Review* 101 (1988): 1146-1163; Kagan, "Confirmation Messes, Old and New," 919-942; Massey, "Getting There," 1-16; Moritz, "'Statistical Judo,'" 341-394; Reynolds, "The Confirmation Process," 80-82; Strauss and Sunstein, "The Senate, the Constitution, and the Confirmation Process," 1491-1524; and, Jeffrey K. Tulis, "Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court," *Case Western Reserve Law Review* 47 (1997): 1331-1357. For scholarship that offers specific proposals for reforming the nomination and confirmation processes, see Brannon P. Denning, "Reforming the New Confirmation Process: Replacing 'Despise and Resent' with 'Advice and Consent,'" *Administrative Law Review* 53 (2001): 1-44; Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, N.J.: Princeton University Press, 2007); Ray Forrester, "A Call for Integrity," *Hastings Constitutional Law Quarterly* 19 (1991): 17-21; Arthur S. Leonard, "A Proposal to Reform the Process for Confirming Justices of the United States Supreme Court," *St. John's Journal of Legal Commentary* 7 (1991): 193-202; Glenn Harlan Reynolds, "Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process," *Southern California Law Review* 65 (1992): 1577-1582; Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings," 109-174; Tuan Samahon, "The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent," *Ohio State Law Journal* 67 (2006): 783-847; and, Walpin, "Take Obstructionism Out," 89-112. Some scholars do, however, oppose making changes to the nomination and confirmation processes. See, for example, Martino, "Change on the Horizon," 164-190, and William G. Ross, "The Supreme Court Appointment Process: A Search for Synthesis," *Albany Law Review* 57 (1994): 993-1042.

Carter terms "disqualifying factors."[60] Consequently, few Court scholars believe the confirmation process, as nominees experience it today, actually functions as a process that thoroughly investigates the nominee's competence and qualifications for serving on the Court; discovering the nominee's ideological leanings and ascertaining potential voting behaviors have become the determinate criterion for judging a nominee's fitness for the Court.[61]

Has the Judiciary Committee's search for 'disqualifying factors,' though, hampered or improved the confirmation process? There is little doubt that the search primarily centers on asking questions to elicit responses to which 'judicial philosophy' the nominee adheres and on how the nominee will resolve cases before the Court.[62] Yet despite the Committee's efforts to ascertain a nominee's ideological leanings and the constitutional theory to which a nominee subscribes, and how those might influence the nominee's vote on a case, Court scholars continue to debate whether the Committee's

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[60] See Stephen L. Carter, "The Confirmation Mess, Continued," *University of Cincinnati Law Review* 62 (1993): 75-100, and Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointment Process* (New York: Basic Books, 1994). For critiques of Carter's book, see Michael J. Gerhardt, "The Confirmation Mystery [book review]," *Georgetown Law Journal* 83 (1994): 395-459; Kagan, "Confirmation Messes, Old and New," 919-942; Paulsen, "Straightening Out *The Confirmation Mess*," 549-579; and, Simson, "Mired in the Confirmation Mess," 1035-1063.

[61] As Lee Epstein and his colleagues note, while Senators "attend to the nominees' qualifications, ideological compatibility now takes precedence." See Epstein, Segal, and Westerland, "The Increasing Importance of Ideology," 102.

[62] See Boyte, "The Supreme Court Confirmation Process in Crisis," 517-547; Carter, "The Confirmation Mess," 1185-1201; and, Arlen Specter, "Concluding Address: On the Confirmation of a Supreme Court Justice," *Northwestern University Law Review* 84 (1990): 1037-1046.

hearings, and the nominee's testimony, actually produce either result.[63] Part of the blame rests with the type of questions posed to the nominees; part of the blame rests with the manner in which nominees respond to their interrogators.[64] Consider, for example, Law Professor Bruce Ackerman's explanation:

> [M]ost nominees can blandly assure the Senate that they have yet to grapple with the large questions of constitutional law that await them on the bench, and

[63] For general discussions on the effectiveness of hearings and questioning, see Michael Comiskey, "The Usefulness of Senate Confirmation Hearings for Judicial Nominees: The Case of Ruth Bader Ginsburg" *PS: Political Science and Politics* 27 (1994): 224-227; Comiskey, *Seeking Justices*, 39-48; Cooper, "Tilting at Windmills," 443-452; Dorsen, "The Selection of U.S. Supreme Court Justices," 661; Heck and Shull, "Policy Preferences of Justices and Presidents," 335-336; Jan Palmer, "Senate Confirmation of Appointments to the U.S. Supreme Court," *Review of Social Economy* 41 (1983): 152-162; and, Nina Totenberg, "The Confirmation Process and the Public: To Know or Not to Know," *Harvard Law Review* 101 (1988): 1213-1229. Writing about the nominations of Lewis F. Powell and William H. Rehnquist and the Committee's attempts to flesh out each nominee's judicial and political philosophy, Barry Goldwater cites the voting record of Justice Felix Frankfurter to illustrate that "the judicial philosophy test . . . is an utterly fallacious practice." Barry Goldwater, "Political Philosophy and Supreme Court Justices," *American Bar Association Journal* 58 (1972): 140. Similarly, as Richard Friedman argues, "ideological consideration at the time of [a Justice's] nomination is futile to the extent that it is impossible to predict what those views will be over the course of his career on the Court." Friedman, "Tribal Myths," 1316-1291. Former Senator Paul Simon, a Committee member during both the Bork and Thomas hearings, argues that nominees should not have to reveal how they would rule on a particular case or issue but that they should tell Committee members the judicial ideology and/or philosophy to which they adhere. See Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles* (Washington, D.C.: National Press Books, 1992), 308. For similar accounts, see Steven Lubet, "Advice and Consent: Questions and Answers," *Northwestern University Law Review* 84 (1990): 879-885; Jonathan Mallamud, "Supreme Court Nominations and 'Political' Decision-Making," *St. John's Journal of Legal Commentary* 7 (1991): 203-210; Melone, "The Senate's Confirmation Role in Supreme Court Nominations," 68-79; Adam Mitzner, "The Evolving Role of the Senate in Judicial Nominations," 387-428; Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings," 109-174; Ross, "The Supreme Court Appointment Process," 993-1042; and, Ryther, "Advice and Consent," 411-433. Stephen Carter, however, argues that nominees should reveal neither their judicial philosophy nor signal how they might vote on a case before the Court, and attempts to commit a nominee to a vote or philosophy poses "a terrible threat to the independence of the judiciary" if the Committee rejects a nominee based on the how the nominee answers the Senators' queries. See Carter, "The Confirmation Mess," 1197-1200.

[64] As Edward Lazarus notes, "After Bork, nominees mastered the art of not answering dangerous questions." Edward Lazarus, "Four Myths about the Supreme Court," *Time*, June 8, 2009, 30.

> promise that they will judge each case on its merits as the Lord allows them to grasp those merits.[65]

While perhaps tinged with a bit of irony, Ackerman's explanation reveals that nominees often successfully avoid disclosing their judicial philosophy and their potential voting behavior; hence, the post-*Brown* and post-Bork changes to the confirmation process seem rather ineffectual in screening out 'radical' Court nominees.

The confirmation hearings, though, serve a secondary purpose as well: the hearings also provide an opportunity for Senators to check the president's attempts to pack the Court with Justices who may share the president's political ideology or who may potentially support the president's agenda.[66] Attributed largely to Robert Dahl's

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[65] Bruce A. Ackerman, "Transformative Appointments," *Harvard Law Review* 101 (1988): 1168. Also see Melone, "The Senate's Confirmation Role in Supreme Court Nominations," 68; Grover Rees III, "Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution," *Georgia Law Review* 17 (1983): 913-967; and, Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices," *American Political Science Review* 83 (1989): 560-561. More importantly, though, how a nominee presages a possible opinion or vote on a case does not guarantee that the nominee will actually vote on a case consistent with his or her testimony before the Committee. For an extended discussion on this issue, see Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings," 141-144. Some scholars also suggest that Justices change their voting patterns after serving extensive time on the Court. See Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal, and Harold J. Spaeth, "Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices," *Journal of Politics* 60 (1998): 801-818.

[66] While an important check on presidential power, Lloyd Cutler persuasively argues that ideally, neither the president nor congress should attempt to seat a Justice on the Court who conforms to either's political ideology. See Lloyd N. Cutler, "The Limits of Advice and Consent," *Northwestern University Law Review* 84 (1990): 876-878. David Crockett suggests that in an effort to advance the president's agenda, the president is likely to nominate an individual who shares the president's constitutional philosophy. Consequently, as Crockett argues, "the Senate is within its rights to evaluate that criterion in its deliberations." David A. Crockett, "The Contemporary President," 321. Joel Grossman and Stephen Wasby support Crockett's claim, and they argue, "[o]pposition to a presidential nominee is a traditional and effective way of challenging" a president's nominee who might support a president's policy initiatives. See Joel B. Grossman and Stephen L. Wasby, "The Senate and Supreme Court Nominations: Some Reflections," *Duke Law Journal* 1972 (1972): 557-558. Also see Barksdale, "Advise and Consent," 1399-1418; Joerg W. Knipprath, "The Judicial Appointment Process: An Appeal for Moderation and Self-

seminal study of the Supreme Court and his 'ruling regime' thesis,[67] and perhaps further fueled by Judge Bork's testimony at his hearings, many Court watchers believe Justices align their voting behaviors with the policies pursued by their appointing president.[68] In theory, then, the hearings should provide an opportunity for the Committee to voice its opposition to the president's candidate by sending a declination recommendation to the full Senate, which can then vote to reject the Court nominee. Yet despite the reservations with seating a potential presidential puppet on the Court, and even with a Senate hostile to the president or when the opposition party of the president controls the Senate, the full

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Restraint," *St. John's Journal of Legal Commentary* 7 (1991): 179-191; and, Donald E. Lively, "The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities," *Southern California Law Review* 59 (1986): 551-579.

[67] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279-295. Lee Epstein and his colleagues succinctly explain Dahl's ruling regime thesis: "The president and Senate will appoint Justices who reflect their ideologies; those Justices, in turn, will vote in line with their own ideologies—which happen to be the same as the President's and the Senate's—thereby legitimizing the interests of the ruling regime." Lee Epstein, Jack Knight, and Andrew D. Martin, "The Supreme Court as a *Strategic* National Policymaker," *Emory Law Journal* 50 (2001): 588. For more on jurisprudential regimes, see Cornell Clayton and David A. May, "A Political Regimes Approach to the Analysis of Legal Decisions," *Polity* 32 (1999): 233-252; Roy B. Flemming, "Contested Terrains and Regime Politics: Thinking about America's Trial Courts and Institutional Change," *Law and Social Inquiry* 23 (1998): 941-965; Herbert M. Kritzer and Mark J. Richards, "Jurisprudential Regimes and Supreme Court Decisionmaking: The *Lemon* Regime and Establishment Clause Cases," *Law & Society Review* 37 (2003): 827-840; Daniel R. Pinello, "Linking Party to Judicial Ideology in American Courts: A Meta-analysis," *Justice System Journal* 20 (1999): 219-254; Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in Supreme Court Decision Making," *American Political Science Review* 96 (2002): 305-320; and, Keith E. Whittington, "Once More Unto the Breach: PostBehavioralist [sic] Approaches to Judicial Politics [book review essay]," *Law & Social Inquiry* 25 (2000): 601-634. On Dahl, see Jonathan D. Casper, "The Supreme Court and National Policy Making," *American Political Science Review* 70 (1976): 50-63, and Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993* (Lawrence: University Press of Kansas, 1994): 7-10.

[68] See, for example, Segal, Timpone, and Howard, "Buyer Beware?" 557-573.

Senate still confirms almost every presidential nominee.[69] In fact, since 1900, the full Senate has confirmed 55 nominees and rejected only four nominees.[70] It appears,

[69] This holds true for "weak" or "lame duck" presidents as well. The key factor seems to be nominating a highly qualified candidate for the open seat on the Court. See, for example, Charles M. Cameron, Albert D. Cover, and Jeffrey A. Segal, "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model," *American Political Science Review* 84 (1990): 525-534; Comiskey, *Seeking Justices*, 63-68; Epstein, Lindstädt, Segal, and Westerland, "The Changing Dynamics of Senate Voting on Supreme Court Nominees," 296-307; Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2007), 102-106, 119-124; Timothy R. Johnson and Jason M. Roberts, "Pivotal Politics, Presidential Capital, and Supreme Court Nominations," *Congress & The Presidency* 32 (2005): 31-48; Palmer, "Senate Confirmation of Appointments,"152-162; Simon, *Advice and Consent*, 35. Additionally, "going public" and touting the candidate's qualifications, especially in the president's nomination speech, aids the president in securing the confirmation of his candidate. For more on "going public" and the confirmation process, see Lisa M. Holmes, "Presidential Strategy in the Judicial Appointment Process: 'Going Public' in Support of Nominees to the U.S. Courts of Appeals," *American Politics Research* 35 (2007): 567-594; Lisa M. Holmes, "Why 'Go Public'? Presidential Use of Nominees to the U.S. Courts of Appeals," *Presidential Studies Quarterly* 38 (2008): 110-122; Timothy R. Johnson and Jason M. Roberts, "Presidential Capital and the Supreme Court Confirmation Process," *Journal of Politics* 66 (2004): 663-683; and, Glen S. Krutz, Richard Fleisher, and Jon R. Bond, "From Abe Fortas to Zoë Baird: Why Some Presidential Nominations Fail in the Senate," *American Political Science Review* 92 (1998): 878. On challenging the nominee during the lame duck period or when the opposition party of the president controls the Senate, see Jeffrey A. Segal, Albert D. Cover, and Charles M. Cameron, "Senate Confirmation of Supreme Court Justices: The Role of Ideology in Senate Confirmation of Supreme Court Justices," *Kentucky Law Journal* 77 (1988-1989): 485-507.

[70] See Moraski and Shipan, "The Politics of Supreme Court Nominations," 1069-1095, and Wayne Sulfridge, "Ideology as a Factor in Senate Consideration of Supreme Court Nominations," *Journal of Politics* 42 (1980): 560-567. The Senate rejected President Herbert Hoover's nominee, John J. Parker, a judge for the 4th Circuit Court of Appeals and who many suspected was a racist, on May 7, 1930, by a 39 to 41 vote; President Richard M. Nixon's nominee, Clement Haynsworth, Jr., also from the 4th Circuit Court, on November 21, 1969, by a 45 to 55 vote, largely due to conflict-of-interest improprieties relating to a case he adjudicated; a second Nixon nominee, G. Harrold Carswell, a judge for the 5th Circuit Court of Appeals and who many thought lacked judicial experience, on April 8, 1970, by a vote of 45 to 51; and, President Ronald Reagan's nominee, Robert H. Bork, a "strict constructionist" judge from the U.S. Court of Appeals for the District of Columbia Circuit, on October 23, 1987, by a vote of 42 to 58. For more on the rejection of these four nominees, see Baum, *The Supreme Court*, 45-47; Grossman and Wasby, "The Senate and Supreme Court Nominations," 557-591; Massey, "Getting There" 1-16; McMahon, "Presidents, Political Regimes, and Contentious Supreme Court Nominations," 919-954; and, Denis S. Rutkus and Maureen Bearden, "Supreme Court Nominations, 1789-2005: Actions by the Senate, the Judiciary Committee, and the President." *CRS Report for Congress*, CRS-1 to CRS-42. http://www.fpc.state.gov/documents/organization/59367.pdf (accessed January 5, 2006).

therefore, that the procedural changes made to the confirmation process have not improved the 'advice and consent' role of the Senate, nor have the changes 'disqualified' nominees for the Court;[71] instead, the president faces a "new politics of [the] nomination and confirmation" process that remains "nasty, brutish, and anything but short."[72]

Given that a largely 'unpopular' and seemingly partisan president might have the opportunity to nominate one or more Justices for the Court,[73] perhaps the Committee would return to the "glory days" of the Bork hearings and challenge President Bush's nominee during the confirmation process. Indeed, the political climate seemed ripe for a showdown with the president and for a battle over the future of the Supreme Court.

With the nomination of Judge John Roberts, though, President Bush hoped to avoid an impending political confrontation with both the Judiciary Committee and the Senate over his nominee's ideological and political leanings, as well as over his nominee's judicial philosophy. By selecting a 'stealth candidate' to assume Justice O'Connor's seat and later, Chief Justice Rehnquist's seat, the president hoped his 'safe' pick for the Court would survive any Senatorial assault during the confirmation process.

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[71] I purposefully do not include the Clarence Thomas hearings in this discussion, as most scholars conclude that Thomas' fitness for the Court centered on the allegations leveled against him regarding his interactions and relationship with Anita Hill. While Thomas' judicial philosophy and potential voting behavior may have been initial concerns, most scholars agree that the Hill allegations and subsequent witness testimony largely supplanted any prior concerns regarding Thomas' qualifications for the Court. See Vieira and Gross, *Supreme Court Appointments*, 200-224.

[72] Mark Silverstein, "Conclusion: Politics and the Rehnquist Court," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz, 277-291 (Lawrence: University Press of Kansas, 2003), 280.

[73] At the time President Bush nominated Judge Roberts to fill Justice O'Connor's seat, the president's public approval ratings were low. See footnote six.

President Bush, it appeared, made the correct choice, as Roberts' hearings defied media predictions and remained largely uneventful.

More importantly, though, the hearings provided little, if any, insight into Judge Roberts' ideology or judicial philosophy. For some Court watchers who closely followed the hearings, Roberts did not tactfully evade a particular line of questioning; rather, the Democratic Committee members mishandled the opportunity before them. As Randy Barnett, a Professor of Law at Boston University, explains,

> Judiciary Committee Democrats spent half their time making speeches rather than questioning. What questions they did ask were not carefully designed to ferret out the nominee's judicial philosophy, favoring instead to inquire about his feelings, or whether he would stand up for the "little guy," or bemoaning his refusal to telegraph how he would rule on particular cases likely to come before the court.[74]

Likewise, the Republicans on the Committee failed to respond appropriately to the president's nomination. Barnett continues:

> By refusing to demand a nominee with a judicial philosophy of adherence to the text of the Constitution—the *whole* text, including the parts that limit federal and state powers—Republicans did nothing to induce the White House to send up a nominee who was at least as committed to limits on federal power as Chief

[74] Randy E. Barnett, "Cronyism," *Wall Street Journal*, October 4, 2005, A26. As Theodore Ruger also notes, "the Senate Judiciary Committee declined a rare opportunity to discuss many of the issues" related to the Chief Justice's power "during the confirmation hearings last summer." Theodore W. Ruger, "The Chief Justice's Special Authority and the Norms of Judicial Power," *University of Pennsylvania Law Review* 154 (2006): 1574. For more on Roberts' testimony, especially his answers to Senators' questions, see Ronald Dworkin, "Judge Roberts on Trial," *New York Review of Books* 52 (2005): 14-17; Hensley, Baugh, and Smith, "The First-Term Performance," 629-630; and, Parry-Giles, *The Character of Justice*, 159-161. In fact, as early as 1976 law professor L.A. Powe found the confirmation hearings and the Senators' questioning of the nominees "astonishingly ineffective in eliciting the desired information." Consequently, after "reading all the available Senate confirmation hearings," Powe recommended that the Committee ask nominees questions "about actions rather than philosophy." L.A. Powe, Jr., "The Senate and the Court: Questioning a Nominee [book review]," *Texas Law Review* 54 (1976): 893, 897.

Justice William Rehnquist and Justice Sandra Day O'Connor had been.[75] Judge Roberts' confirmation hearings, therefore, lacked the scrutiny and the hostility of the Bork hearings, the drama of the Thomas hearings, and once again the post-*Brown* and post-Bork procedural changes did little to affect the outcome of the 'advice and consent' process.

Ultimately, the apocalyptic predictions of an epic "battle" between the president and the senate instead played out as "yet another skirmish" in the process of Court nominations and confirmations,[76] and the Senate Judiciary Committee's confirmation hearings of Judge Roberts lacked the fanfare and media frenzy that the Bork and Thomas hearings generated. Unlike with Bork, no one could claim that Roberts experienced a 'confirmation conversion,'[77] and unlike that which occurred during the Thomas' hearings, no witnesses appeared before the Committee and accused Roberts of occupational improprieties.[78] Barring the discovery of a 'smoking gun' to prove that Roberts posed a realistic threat to America and her Constitution, perhaps the Senators on

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[75] Barnett, "Cronyism," A26. Italics in original. Despite the criticisms of Barnett and others, Henry J. Abraham believes "the modern Senate confirmation process has not affected the quality of United States Supreme Court Justices adversely." See Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton*, 330.

[76] Neubauer and Meinhold, *Battle Supreme*, 57.

[77] Ethan Bronner, in his appropriately titled chapter, "Confirmation Conversion," discusses the scenario in which a nominee, during the confirmation hearings, modifies a stance previously taken in an article or a speech. See Bronner, *Battle for Justice*, 211-230.

[78] As Lawrence Baum succinctly stated, "Nothing like a smoking gun emerged for Roberts." Baum, *The Supreme Court*, 48.

the Judiciary Committee concluded that Roberts was qualified for a seat on the Court[79] and that his elevation to the Court simply would replace one conservative vote (Rehnquist's) with another conservative vote (Roberts'). An apocalyptic showdown avoided, the Committee sent Roberts' name to the full Senate, and he received the Senate's partisan blessing for the Chief Justice' seat on the Supreme Court and he became the Court's 17th Chief Justice.

The Chief Justice and the Supreme Court

Save for a few memorable baseball analogies,[80] the confirmation hearings of the new Chief Justice of the Supreme Court seemed rather uneventful. For some, the hearings lacked the climax of a good political drama; for others, the hearings demonstrated that America's constitutional democracy functioned as designed. The Senate exercised its 'advice and consent' role, and the president secured his appointment for the Court, thereby satisfying two important aspects of the constitutional process. Even though Roberts' nomination did generate the to-be-expected partisan criticism, that the president and the senate avoided an apocalyptic showdown demonstrates that Roberts appears to have been the 'safe' pick for the Court. Given these factors, one might pose the following question: Is there a reason to conduct a more in-depth study of John Roberts and his elevation to the High Court? This project attempts to provide

[79] On how senators vote for a nominee based on their perception of the nominee's qualifications, See Epstein, Segal, and Westerland, "The Increasing Importance of Ideology," 101-127.

[80] See Dworkin, "Judge Roberts on Trial," 14-17; Parry-Giles, *The Character of Justice*, 157-164; Luiza Ch. Savage, "'Justices are Like Umpires': The Roberts Hearings Prove Downright Civilized," *Maclean's*, September 26, 2005, 36; Neil S. Siegel, "Umpires at Bat: On Integration and Legitimation," *Constitutional Commentary* 24 (2007): 701-732; and, "Umpires," *Commonweal*, September 27, 2005, 5.

answers to that question, especially considering that Chief Justice Roberts now holds "one of the most important, and least studied, major offices in American government."[81] My project, therefore, offers four rationales for studying the new Chief Justice.

The first rationale for studying John Roberts and his elevation to Chief Justice involves the unique position that the Chief Justice holds.[82] Even though there are nine

[81] Theodore W. Ruger, "Foreword: The Chief Justice and the Institutional Judiciary," *University of Pennsylvania Law Review* 154 (2006): 1323. Frank Cross and Stefanie Lindquist echo Ruger's claim: "The office of the Chief Justice . . . has been the subject of relatively little research." Frank B. Cross and Stefanie Lindquist, "Doctrinal and Strategic Influences of the Chief Justice: The Decisional Significance of the Chief Justice," *University of Pennsylvania Law Review* 154 (2006): 1665. Ruger does caution that a study such as the one this project undertakes "is necessarily episodic, focusing on a particular Chief Justice within a particular set of Supreme Court Justices at a certain place and time. As such it runs the risk of at once understating and overstating the role of the Chief Justice" (p. 1325). As this project will demonstrate, however, such an episodic study is justified. Ruger also discusses the necessity for changing the tenure of the Chief Justice given the importance of the position. For additional views on changing the appointment and tenure process, see Howard C. Anawalt, "Choosing Justice," *St. John's Journal of Legal Commentary* 7 (1991): 56-58; Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law & Public Policy* 29 (2006): 769-787; James E. DiTullio and John B. Schochet, "Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms," *Virginia Law Review* 90 (2004): 1093-1149; Lawlor, "Court Packing Revisited," 967-1000; Mark R. Levin, *Men in Black: How the Supreme Court is Destroying America* (Washington, D.C.: Regnery Publishing, Inc., 2005), 201-202; Henry Paul Monaghan, "The Confirmation Process: Law or Politics?" *Harvard Law Review* 101 (1988): 1202-1212; Todd E. Pettys, "Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?" *Journal of Law & Politics* 22 (2006): 231-281; Judith Resnik and Lane Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States," *University of Pennsylvania Law Review* 154 (2006): 1575-1664; and, Edward T. Swaine, "Hail, No: Changing the Chief Justice," *University of Pennsylvania Law Review* 154 (2006): 1709-1728. For scholarship refuting the calls to alter the tenure of the Justices, see Ward Farnsworth, "The Ideological Stakes of Eliminating Life Tenure," *Harvard Journal of Law & Public Policy* 29 (2006): 887-889, and Kevin T. McGuire, "Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court," *Judicature* 89 (2005): 8-15.

[82] For an excellent account on the expanse of the Chief Justice's powers, see Drew Noble Lanier and Sandra L. Wood, "Moving on Up: Institutional Position, Politics, and the Chief Justice," *American Review of Politics* 22 (2001): 93-127. Also see Baum, *The Supreme Court*, 137-142; Rutkus and Tong, *The Chief Justice of the United States*; and, Swaine, "Hail, No," 1709-1728.

Justices on the Court, the Chief Justice's "position is the most powerful on the Court."[83] There are several reasons that support this claim. Initially, a Chief Justice brings his own leadership style to the Court,[84] which consequently "affects the norms of Court behavior"[85] among the Justices. Few scholars would disagree with the characterization of the Court as a frequently contentious site for constitutional adjudication. As such, the Chief leads a group of Justices who hold differing ideologies and policy aims and who approach and make their decisions from a variety of judicial philosophies, all of which influence their interactions with one another. Consequently, the Chief's leadership style can either further, or further impede, the collegiality of the Justices.[86] By promoting

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[83] Palmer, "Senate Confirmation of Appointments," 158. Also see Sue Davis, "The Chief Justice and Judicial Decision-Making: The Institutional Basis for Leadership on the Supreme Court," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman, 135-154 (Chicago: The University of Chicago Press, 1999); Forrest Maltzman and Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," *American Journal of Political Science* 40 (1996): 421-422; P. S. Ruckman, Jr., "The Supreme Court, Critical Nominations, and the Senate Confirmation Process," *Journal of Politics* 55 (1993): 793-805; Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* (Columbia: University of South Carolina Press, 1986); and, Lawrence S. Wrightsman, *The Psychology of the Supreme Court* (New York: Oxford University Press, 2006), 199-228.

[84] I purposefully refer to the Chief Justice using the masculine, as all seventeen Chief Justices of the Supreme Court have been men, though with the addition of Justices Sonia Sontamayor and Elena Kagan to the Court, I recognize that a female may some day occupy the Chief Justice' seat.

[85] Stacia L. Haynie, "Leadership and Consensus on the U.S. Supreme Court," *Journal of Politics* 54 (1992): 1160. Frank Cross and Stefanie Lindquist suggest that each Chief's "personality and inclinations" influence the Court. Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1666.

[86] As retired Associate Justice Sandra Day O'Connor noted, "The new Chief can bring tremendous changes in the operations of the court, from the way cases are discussed and opinions written to the very guiding ethos and atmosphere. Sandra Day O'Connor, "John Roberts," *Time*, April 30, 2006, http://www.time.com/time/magazine/article/0,9171,1187207,00.html (accessed May 17, 2007). Duke Law Professor Erwin Chemerinsky concurs with O'Connor, and he suggests that "a key role of the Chief is in the operation of the Supreme Court, including its efficiency and its collegiality." Chemerinsky also notes that the Chief Justice's influence extends via his oversight of the Judicial Conference of the United States,

collegiality, the Chief can lessen the polarization that frequently exists among the Justices, and theoretically, a less polarized Court should produce more unanimous decisions.[87] A second, and related, reason involves how the Justices discuss and debate cases amongst themselves in conference meetings, as well as how they write the final drafts that become their published opinions. One of the leading legal authorities on the Supreme Court, Law Professor Erwin Chemerinsky, explains the extent to which the Chief Justice influences the discussion and writing process:

> [A] Chief Justice can influence the substantive decision making of the Court. The Chief plays a key role in leading the conferences that determines which cases will be heard. The Chief leads the discussions at conferences where the cases are decided. The Chief assigns the majority opinion when in the majority, and this often can be important in keeping the majority. In all these ways and others, a Chief can have a significant effect on the decisions. All of these forms of influence are invisible outside the Court, except by looking at the results and the decisions themselves.[88]

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as well as his power to appoint individuals to specialized courts and committees. See Edwin Chemerinsky, "Keynote Address: Assessing Chief Justice William Rehnquist," *University of Pennsylvania Law Review* 154 (2006): 1332-1333. On consensus building and the Court, see Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (New York: Random House, 1998).

[87] By "unanimous" I mean, and as supported by the literature on Court voting, a decline in the number of 5 to 4 decisions, as well as a decline in the number of concurring and dissenting (or variation thereof) opinions. On the Chief's ability to reduce the number of "nonconsensual" opinions, see Bradley J. Best, *Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court, 1935-1995* (New York: LFB Scholarly Publishing LLC, 2002), 225, and Michael W. Schwartz, "Our Fractured Supreme Court," *Policy Review*, February/March 2008, 3-16. On the potential for greater collaboration among the Justices, see Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton & Company, Inc., 2005), 319-345.

[88] Chemerinsky, "Keynote Address," 1363. Robert Steamer also suggests that the Chief Justice influences the process: "The decisions and the opinions with justifying reasons, though bearing an individual justice's name, are fundamentally a collegial effort, reflecting the chief's leadership or lack of it." Steamer, *Chief Justice*, 300-301. Also see Steven G. Calabresi, "Don't Split the Baby!" *Wall Street Journal*, October 22-23, 2005, A7, and Ruger, "The Chief Justice's Special Authority," 1551-1574. There are scholars who disagree with the Chemerinsky's "keeping the majority" claim. See, for example, Theodore S. Arrington

How the Chief leads the conference discussions and to whom he assigns the writing of the majority opinion,[89] then, also functions as an effort to ease the Court's ideological polarization.[90] At the same time, having the ability to assign authorship of the majority

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and Saul Brenner, "Strategic Voting for Damage Control on the Supreme Court," *Political Research Quarterly* 57 (2004): 565-573.

[89] The Chief Justice assigns authorship of the majority opinion when the Chief votes with the majority. If the Chief does not vote with the majority, then the senior associate Justice in the majority assigns authorship of the opinion. Frank Cross and Stefanie Lindquist note that the Chief's assignment of authorship of the majority opinion is "[t]he most . . . influential power of the Chief Justice." Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1673. Saul Brenner notes, though, that there are occurrences where the initially-assigned author of the Court's opinion is not the author of the final opinion. See Saul Brenner, "Strategic Choice and Opinion Assignment on the U.S. Supreme Court: A Reexamination," *Western Political Quarterly* 35 (1982): 206. In some cases, the Chief assigns authorship of an opinion to a Justice with a specialization in the area of which the case deals. See Saul Brenner, "Issue Specialization as a Variable in Opinion Assignment on the U.S. Supreme Court," *Journal of Politics* 46 (1984): 1217-1225, and Saul Brenner and Harold J. Spaeth, "Issue Specialization in Majority Opinion Assignment on the Burger Court," *Western Political Quarterly* 39 (1986): 520-527. For a discussion of all of these assignment options, see Saul Brenner and Jan Palmer, "The Time Taken to Write Opinions as a Determinant of Opinion Assignments," *Judicature* 72 (1988): 179-184. On opinion assignment in general, see Beverly B. Cook, "Measuring the Significance of U.S. Supreme Court Decisions," *Journal of Politics* 55 (1993): 1127-1139.

[90] See, for example, Corey Ditslear and Lawrence Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court," *Journal of Politics* 63 (2001): 869-885. Perhaps Ditslear and Baum's suggestion results from the Justices' frequent tendency to express in their published opinions the ideological polarization that exists on the Court. See David K. Scott and Robert H. Gobetz, "The U.S. Supreme Court 1969-1992: A Shift Toward an Individualistic Style of Judging," *Communication Studies* 54 (2003): 212. For more on dissenting opinions, see Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, N.J.: Princeton University Press, 2006), 128-131; William J. Brennan, Jr., "In Defense of Dissents," *The Hastings Law Journal* 37 (1986): 427-438; J. Louis Campbell, III, "The Spirit of Dissent," *Judicature* 66 (1983): 305-312; Paul M. Collins, Jr., "Variable Voting Behavior on the Supreme Court: A Preliminary Analysis and Research Framework," *Justice System Journal* 25 (2004): 57-74; Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, "The Norm of Consensus on the U.S. Supreme Court," *American Journal of Political Science* 45 (2001): 362-377; Kevin M. Stack, "The Practice of Dissent in the Supreme Court," *Yale Law Journal* 105 (1996): 2235-2259; Harlan F. Stone, "Dissenting Opinions are Not without Value," *Journal of the American Judicature Society* 26 (1942): 78; and, Paul J. Wahlbeck, "Strategy and Constraints on Supreme Court Opinion Assignment," *University of Pennsylvania Law Review* 154 (2006): 1742-1746.

opinion "is one of the chief justice's most important tools,"[91] and assignment also allows the Chief Justice to "influence doctrinal form and rationale," and the subsequent manner in which the authors write their opinions "often resonate[s] in future cases and lower courts much more significantly than the unadorned 'outcome' of a Supreme Court case."[92] This holds especially true when the Chief self-assigns the majority opinion, especially on important decisions or potentially landmark cases.[93] Perhaps most significant, however, is that holding these powers creates an opportunity for the Chief to move the Justices toward reaching a larger consensus in their decisions,[94] which thereby

[91] Forrest Maltzman, James F. Spriggs, II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (London: Cambridge University Press, 2000): 8. A two other legal scholars note, "In the context of the Supreme Court, the main form of agenda control is the right to assign on [sic] write the (initial) majority opinion." Robert Anderson IV and Alexander M. Tahk, "Institutions and Equilibrium in the United States Supreme Court," *American Political Science Review* 101 (2007): 819.

[92] Ruger, "Foreword: The Chief Justice and the Institutional Judiciary," 1327.

[93] For example, see Saul Brenner, "The Chief Justices' Self-Assignment of Majority Opinions in Salient Cases," *Social Science Journal* 30 (1993): 143-150; Brenner and Palmer, "The Time Taken to Write Opinions," 179-184; Elliot E. Slotnick, "The Chief Justices and Self-Assignment of Majority Opinions: A Research Note," *Western Political Quarterly* 31 (1978): 219-225; and, Elliott E. Slotnick, "Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger," *American Journal of Political Science* 23 (1979): 60-77. Both Brenner and Slotnick conclude that the Chief Justice self-assigns opinions on important cases or, according to Slotnick, when a case produces a highly divided Court. Also see Forrest Maltzman, James F. Spriggs, II, and Paul J. Wahlbeck, "Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman, 54 (Chicago: The University of Chicago Press, 1999). The authors contend that self-assignment "increases the probability that the final opinion will be consistent with his policy preferences."

[94] Stacia Haynie observes that the leadership of the Chief Justice "is certainly a driving force" in the Court's ability to achieve consensus rather than dissensus (i.e. concurring opinions, dissenting opinions, and dissenting votes). See Haynie, "Leadership and Consensus on the U.S. Supreme Court," 1160-1166. Other scholars describe consensus and dissensus as "institutionalistic" and "individualistic" judging styles, respectively. See, for example, Scott and Gobetz, "The U.S. Supreme Court 1969-1992," 211-229, and Robert W. Bennett, "Styles of Judging," *Northwestern University Law Review* 84 (1990): 853-855. Lawrence Friedman suggests that the increase in concurring opinions reflects a decline in collegiality. See

sends a signal both to the lower courts and to those who practice within the courts that the Supreme Court's decisions carry greater weight.[95] For these reasons, then, it seems prudent to examine how Chief Justice Roberts leads the Court, how his leadership influences the published opinions being released by the Court, and when he elects to self-assign an opinion.

The second rationale for conducting an in-depth study of Chief Justice John Roberts centers on the importance legal scholars place on a Justice's judicial, or constitutional, philosophy. In brief, and which the next chapter discusses at greater length, a judicial philosophy is the "internalized view of the Constitution" to which a

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Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Simon & Schuster, 2007), 552-553. Frank Cross and Stefanie Lindquist suggest, however, that the Chief Justice may not have "the power to reverse the frequency of dissents and concurrences." Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1681. Theodore Ruger offers a similar assessment, and he suggests "the Chief Justice's unique influence *within* the Supreme Court's core adjudicative enterprise is limited" and the Chief's "internal strategic leadership . . . only has a limited effect on the Court's outcomes." Theodore W. Ruger, "The Judicial Appointment Power of the Chief Justice," *University of Pennsylvania Journal of Constitutional Law* 7 (2004): 349, 350. Italics in original. Craig M. Bradley offers a similar assessment: "[T]he Chief Justice has little formal power over his fellow Justices . . . Thus, no Chief Justice is likely to exert much sway over the votes of his or her fellows." Craig M. Bradley, ed. *The Rehnquist Legacy* (New York: Cambridge University Press, 2006), 4. While some dispute the claim that the Court achieves consensus, as Epstein and his colleagues note, "a norm of consensus did, in all likelihood, exist during much of the Court's history." Epstein, Segal, and Spaeth, "The Norm of Consensus on the U.S. Supreme Court," 376.

[95] Michael Sean Quinn notes that for lawyers arguing cases before the Court, many "believe that five-to-four opinions constitute weak, pale, or somehow-faded authority." Michael S. Quinn, "Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles," *Chicago-Kent Law Review* 74 (1999): 719. Associate Justice Ruth Bader Ginsburg offers a similar claim: "But overindulgence in separate opinion writing may undermine both the reputation of the judiciary for judgment and the respect accorded court dispositions. The rule-of-law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body." Ruth Bader Ginsburg, "Speaking in a Judicial Voice," in *The Unpredictable Constitution*, ed. Norman Dorsen (New York: New York University Press, 2002), 75. Also see John F. Davis and William J. Reynolds, "Judicial Cripples: Plurality Opinions in the Supreme Court," *Duke Law Journal* 1974 (1974): 59-86.

Justice subscribes,[96] and which provides "a theory or a framework of principles to guide constitutional interpretation."[97] Some of the leading constitutional theories include Dworkinism,[98] formalism,[99] positivism,[100] pragmatism,[101] realism,[102] and the most

[96] Barnett, "Cronyism," A26. According to Stephen Gottlieb, "justices decide cases in line with their own private, preexisting philosophies of law." Stephen E. Gottlieb, *Morality Imposed: The Rehnquist Court and Liberty in America* (New York: New York University Press, 2000), ix. Anthony D'Amato echoes this claim, noting, "[W]e understand that judges (from their internal point of view) believe that their own theories explain the law." Anthony D'Amato, "The Effect of Legal Theories on Judicial Decisions," *Chicago-Kent Law Review* 74 (1999): 527. Specifically, D'Amato offers brief summaries on five of the primary legal theories to which judges subscribe: formalism, legal realism, natural law, positivism, and pragmatism.

[97] Leslie Friedman Goldstein, *In Defense of the Text: Democracy and Constitutional Theory* (Savage, MD: Rowman & Littlefield Publishers, Inc., 1991), 1. Goldstein "catalogues" the major legal theories as intentionalism, textualism (interpretivism), extratextualism (noninterpretivism), indeterminacy, and Dworkinism (pp. 2-3). For an excellent collection of articles on legal theories compiled in one source, see "Symposium: The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence," *Cornell Law Review* 73 (1998): 281-446. For discussions that generally address, via comparisons and contrasts, the prominent legal theories, see Gregory Bassham, *Original Intent and the Constitution: A Philosophical Study* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1992); Frank B. Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance," *Northwestern University Law Review* 92 (1997): 251-326; D'Amato, "The Effect of Legal Theories on Judicial Decisions," 517-527; Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97 (1997): 1-56; Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, N.J.: Princeton University Press, 1996), 140-191; Geoffrey D. Klinger, "Law as Communicative Praxis: Toward a Rhetorical Jurisprudence," *Argumentation and Advocacy* 30 (1994): 236-247; H.W. Perry, Jr. and L.A. Powe, Jr., "The Political Battle for the Constitution," *Constitutional Commentary* 21 (2004): 641-696; and, Richard D. Rieke, "The Rhetoric of Law: A Bibliographic Essay," *Today's Speech* 18 (1970): 48-57. On intentionalism, see John B. Gates and Glenn A. Phelps, "Intentionalism in Constitutional Opinions," *Political Research Quarterly* 49 (1996): 245-261.

[98] Ronald Dworkin often engages in scholarly debates in which he argues against positivism and/or pragmatism. For the influential texts that outline his theory, consult Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); and, Ronald Dworkin, *Justice in Robes* (Cambridge, MA: The Belknap Press of Harvard University Press, 2008). Concerning Dworkin's refutation of pragmatism (and, therefore, Judge Richard A. Posner and/or Professor Cass Sunstein's position), see Ronald Dworkin, "In Praise of Theory," *Arizona State Law Journal* 29 (1997): 353-376, and Ronald Dworkin, "Reply," *Arizona State Law Journal* 29 (1997): 431-456. For additional discussions of Dworkinism, see Ofer Raban, "Dworkin's 'Best Light' Requirement and the Proper Methodology of Legal Theory," *Oxford Journal of Legal Studies* 23 (2003): 243-264; E. Philip Soper, "Legal Theory and the

Obligation of a Judge: The Hart/Dworkin Dispute," *Michigan Law Review* 75 (1977): 473-519; and Robin West, "Taking Moral Argument Seriously," *Chicago-Kent Law Review* 74 (1999): 499-516. On critiques of Dworkin and his theory, see Peter de Marneffe, "But Does Theory Lead to Better Legal Decisions?: Response to Ronald Dworkin's *In Praise of Theory*," *Arizona State Law Journal* 29 (1997): 427-430; F.M. Kamm, "Theory and Analogy in Law," *Arizona State Law Journal* 29 (1997): 405-425; Stefanie A. Lindquist and Frank B. Cross, "Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent," *New York University Law Review* 80 (2005): 1156-1206; Richard S. Markovits, *Matters of Principle: Legitimate Legal Argument and Constitutional Interpretation* (New York: New York University Press, 1998), 91-109; Richard A. Posner, "Conceptions of Legal 'Theory': A Response to Ronald Dworkin," *Arizona State Law Journal* 29 (1997): 377-388; Daniel J. Solove, "Postures of Judging: An Exploration of Judicial Decisionmaking," *Cardozo Studies in Law and Literature* 9 (1997): 173-228; and, Cass R. Sunstein, "From Theory to Practice," *Arizona State Law Journal* 29 (1997): 389-404.

[99] Many consider Harvard Law School's Christopher Columbus Langdell as the leading proponent of formalism. For scholarship on formalism, see David M. Driesen, "Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication," *Cornell Law Review* 89 (2004); 808-891; Charles C. Goetsch, "The Future of Legal Formalism," *American Journal of Legal History* 24 (1980): 221-256; Richard H. Pildes, "Forms of Formalism," *University of Chicago Law Review* 66 (1999): 607-621; Frederick Schauer, "Formalism," *Yale Law Journal* 97 (1988): 509-548; and, Cass R. Sunstein, "Must Formalism Be Defended Empirically?" *University of Chicago Law Review* 66 (1999): 636-670.

[100] Many scholars consider H.L.A. Hart the first proponent of positivism. The primary texts from Hart include H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593-629, and H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961). For additional commentary on Hart and his works, see Robert S. Gerstein, "Hart's Positivism [book review]," *American Bar Foundation Research Journal* 1985 (1985): 629-638, and Cristóbal Orrego, "H.L.A. Hart's Understanding of Classical Natural Law Theory," *Oxford Journal of Legal Studies* 24 (2004): 287-302. For additional guidance on positivism, see Stefano Bertea, "Certainty, Reasonableness and Argumentation in Law," *Argumentation* 18 (2004): 465-478; Jules L. Coleman, "Negative and Positive Positivism," *Journal of Legal Studies* 11 (1982): 139-164; "Commentary on Constitutional Positivism," *Connecticut Law Review* 25 (1993): 829-946; David Dyzenhaus, "The Incoherence of Constitutional Positivism," in *Expounding the Constitution: Essays in Constitutional Theory*, ed. Grant Huscroft, 138-160 (New York: Cambridge University Press, 2008); Matthew H. Kramer, "Once More into the Fray: Challenges for Legal Positivism," *University of Toronto Law Journal* 57 (2008): 1-38; and, Frederick Schauer, "Constitutional Positivism," *Connecticut Law Review* 25 (1993): 797-828.

[101] Those individuals most often cited as the key proponents of pragmatism include Oliver Wendell Holmes, Benjamin Cardozo, and Karl Llewellyn. For scholarship on pragmatism, see Thomas C. Grey, "Freestanding Legal Pragmatism," *Cardozo Law Review* 18 (1996): 21-42; Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago: The University of Chicago Press, 1990); Richard A. Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995); Richard A. Posner, "Pragmatic Adjudication," *Cardozo Law Review* 18 (1996): 1-20; Richard A. Posner, "Against Constitutional Theory," in *The Unpredictable Constitution*, ed. Norman Dorsen, 217-238 (New York: New York University Press, 2002); Richard A. Posner, "Foreword: A Political Court," *Harvard Law Review* 119 (2005): 32-102; Margaret Jane Radin and Frank Michelman, "Pragmatist and Poststructuralist Critical Legal Practice," *University of*

contentious of all the legal theories, originalism, which some scholars also label as textualism[103] or refer to using a similar descriptor.[104] With Roberts' appointment to the

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Pennsylvania Law Review 139 (1991): 1019-1058; Richard Rorty, "Pragmatism and Law: A Response to David Luban," *Cardozo Law Review* 18 (1996): 75-83. For critiques of pragmatism, see Kamm, "Theory and Analogy in Law," 405-425; David Luban, "What's Pragmatic about Legal Pragmatism?" *Cardozo Law Review* 18 (1996): 43-73; and, Michel Rosenfeld, "Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice without Metaphysics Meets Hate Speech" *Cardozo Law Review* 18 (1996): 97-151.

[102] Most legal scholars attribute the origins of the legal realist movement to Oliver Wendell Holmes, Jr. Other key legal realists include Jerome Frank, and even though they often are labeled as pragmatists, some scholars identify Benjamin Cardozo and Karl Llewellyn as realists (see chapter 2 for a discussion on these attributions). For readings on realism, see John Brigham, "The Upper Courts: Scholarship and Authority," *Social Epistemology* 5 (1991): 16-19; John Brigham and Christine Harrington, "Realism in the Authority of Law," *Social Epistemology* 5 (1991): 20-25; Anthony D'Amato, "The Limits of Legal Realism," *Yale Law Journal* 87 (1978): 468-513; Hanoch Dagan, "The Realist Conception of Law," *University of Toronto Law Journal* 57 (2007): 607-660; William W. Fisher, III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993), 3-8; L. L. Fuller, "American Legal Realism," *University of Pennsylvania Law Review* 82 (1934): 429-462; Michael Steven Green, "Legal Realism as a Theory of Law," *William and Mary Law Review* 46 (2005): 1915-2000; Dale Hample, "Motives in Law: An Adaptation of Legal Realism," *Journal of the American Forensic Association* 15 (1979): 156-168; Marouf Hasian, Jr., "The Domestication of Legal Argumentation: A Case Study of the Formalism of the Legal Realists," *Communication Quarterly* 46 (1998): 430-445; "Holmes, Peirce and Legal Pragmatism," *Yale Law Journal* 84 (1975): 1123-1140; Hans A. Linde, "Judges, Critics, and the Realist Tradition," *Yale Law Journal* 82 (1972): 227-256; Karl N. Llewellyn, "A Realistic Jurisprudence—The Next Step," *Columbia Law Review* 30 (1930): 431-465; Karl N. Llewellyn, "Some Realism about Realism," *Harvard Law Review* 44 (1931): 1222-1256; James O'Brien, "Conclusion: Legal Institutions and Limitations to Cognition and Power," *Social Epistemology* 5 (1991): 44-60; Richard Posner, "Jurisprudential Responses to Legal Realism," *Cornell Law Review* 73 (1988): 326-330; Hilary Putnam, "Pragmatism and Realism," *Cardozo Law Review* 18 (1996): 153-170; Martin H. Redish, "Legal Realism and the Confirmation Process: A Comment on Professor Nagel's Thesis," *Northwestern University Law Review* 84 (1990): 886-888; Wilfred Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, N.Y.: Cornell University Press, 1968); and, William Twining, "Talk about Realism," *New York University Law Review* 60 (1985): 329-384.

[103] Associate Justice Antonin Scalia is the leading originalist/textualist on the Court. For Scalia's account of originalism/textualism, see Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849-865; Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175-1188; and, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997). For excellent analyses of Scalia's judicial philosophy, see Richard A. Brisbin, Jr., "Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State," *Western Political Quarterly* 44 (1991): 1005-1038; J. Richard Broughton, "The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution," *West Virginia Law Review* 103

(2000): 19-80; Shawn Burton, "Justice Scalia's Methodological Approach to Judicial Decision-Making: Political Actor or Strategic Institutionalist?" *University of Toledo Law Review* 34 (2003): 575-609; William N. Eskridge, Jr., "The New Textualism," *UCLA Law Review* 37 (1990): 621-692; Ralph A. Rossum, "Text and Tradition: The Originalist Jurisprudence of Antonin Scalia," in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz, 34-69 (Lawrence: University Press of Kansas, 2003); Ralph A. Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* (Lawrence: University Press of Kansas, 2006); David A. Schultz and Christopher E. Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 1996); James B. Staab, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006); and, David M. Zlotnick, "Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to his Constitutional Methodology," *Emory Law Journal* 48 (1989): 1377-1429. For general discussions on originalism/textualism, see Jack M. Balkin, "Original Meaning and Constitutional Redemption," *Constitutional Commentary* 24 (2007): 427-532; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, N.J.: Princeton University Press, 2004), 89-117; Randy E. Barnett, "Underlying Principles," *Constitutional Commentary* 24 (2007): 405-416; Belz, *A Living Constitution or Fundamental Law*?, 221-272; Steven G. Calabresi, "The Right Judicial Litmus Test," *Wall Street Journal*, October 1, 2007, A23; Steven G. Calabresi, *Originalism: A Quarter-Century of Debate* (Washington, D.C.: Regnery Publishing, Inc., 2007); Emily C. Cumberland, "Originalism in a Nutshell," *Engage* 11 (2010): 52-56; Eskridge, Jr., "The New Textualism," 621-691; Daniel A. Farber, "The Originalism Debate: A Guide for the Perplexed," *Ohio State Law Journal* 49 (1989): 1085-1106; Philip P. Frickey, "Transcending the Routine: Methodology and Constitutional Values in Chief Justice Rehnquist's Statutory Cases," in *The Rehnquist Legacy*, ed. Craig M. Bradley, 266-278 (New York: Cambridge University Press, 2006); Dennis J. Goldford, *The American Constitution and the Debate over Originalism* (New York: Cambridge University Press, 2005); Graglia, "How the Constitution Disappeared," 19-27; Robert M. Howard and Jeffrey A. Segal, "An Original Look at Originalism," *Law & Society Review* 36 (2002): 113-138; Gary Lawson and Guy Seidman, "Originalism as a Legal Enterprise," *Constitutional Commentary* 23 (2006): 47-80; Charles A. Lofgren, "The Original Understanding of Original Intent?" *Constitutional Commentary* 5 (1988): 77-113; Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* (Ithaca, NY: Cornell University Press, 1999); Earl M. Maltz, "Foreword: The Appeal of Originalism," *Utah Law Review* 1987 (1987): 773-805; Earl M. Maltz, *Rethinking Constitutional Law: Originalism, Interventionism, and the Politics of Judicial Review* (Lawrence: University Press of Kansas, 1994); John O. McGinnis and Michael Rappaport, "Original Interpretive Principles as the Core of Originalism," *Constitutional Commentary* 24 (2007): 371-382; Henry Paul Monaghan, "Stare Decisis and Constitutional Adjudication," *Columbia Law Review* 88 (1988): 723-773; O'Neill, *Originalism in American Law and Politics*; "Original Meaning and Its Limits," *Harvard Law Review* 120 (2007): 1279-1300; Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990); Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven, CT: Yale University Press, 2004); Eileen A. Scallen, "Classical Rhetoric, Practical Reasoning, and the Law of Evidence," *American University Law Review* 44 (1995): 1717-1816; "Symposium: Can Originalism be Reconciled with Precedent?" *Constitutional Commentary* 22 (2005): 257-348; John T. Valauri, "The Varieties of Constitutional Theory: A Comment on Perry and Hoy," *Northern Kentucky Law Review* 15 (1988): 499-512; and, Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999). For extended critiques of originalism/textualism, see William D. Bader, "Meditations on the Original: James Madison, Framer with

Court, several scholars offer prudentialism as yet another way to examine a Justice's judicial framework.[105] According to legal scholars, adherence to a constitutional philosophy leads, either theoretically or practically, a Justice "through the constitutional minefield that the Supreme Court must navigate."[106] Understanding a Justice's philosophy, therefore, allows one to envision how a Justice may approach, and ultimately resolve, a case. The ability to discern a Justice's philosophy takes on greater importance when recognizing that a "constitutional theory (or combination of theories),

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Common Law Intentions—Ramifications in the Contemporary Supreme Court," *Vermont Law Review* 20 (1995): 5-17; Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 204-238; William N. Eskridge, Jr., "Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?" *George Washington Law Review* 66 (1998): 1301-1323; Dennis J. Goldford, "The Political Character of Constitutional Interpretation," *Polity* 23 (1990): 255-281; James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," *Texas Law Review* 65 (1986): 1-39; H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (1985): 885-948; Richard B. Saphire, "Enough about Originalism," *Northern Kentucky Law Review* 15 (1988): 513-538; Laurence H. Tribe, "How Relevant is 'Original Intent' Doctrine?" *Legal Times*, December 26, 1986, 12, 14; and, Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* (Cambridge, MA: Harvard University Press, 1991). For an extensive discussion of originalism and nonoriginalism as applied to a sampling of Supreme Court opinions, see T. R. van Geel, *Understanding Supreme Court Opinions*, 5th ed. (New York: Pearson/Longman, 2007), 52-79. For a look at originalism in the early Republic, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996). See especially "Madison and the Origins of Originalism," 339-365.

[104] Bassham, for example, notes that many scholars also refer to "originalism" as "constitutional originalism," "historicism," "intentionalism," "interpretivism," "preservatism," as well as a "host of cognate locutions." See Bassham, *Original Intent and the Constitution*, 17.

[105] See, for example, Daniel Breen, "Avoiding 'Wild Blue Yonders': The Prudentialism of Henry J. Friendly and John Roberts," *South Dakota Law Review* 52 (2007): 73-135, and Edward A. Hartnett, "Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts," *SMU Law Review* 59 (2006): 1735-1760.

[106] Barnett, "Cronyism," A26. Yvette Barksdale argues that "a Justice's institutional views on the structure of government, a Justice's philosophy of constitutional interpretation, and a Justice's view of the nature of the world" justifies making "ideology" a qualification for a seat on the Court. Barksdale, "Advise and Consent," 1413. Also see Kagan, "Confirmation Messes, Old and New," 935-936.

as a matter of sheer fact, does underlie every judicial opinion deciding a constitutional case."[107] Admittedly, it may be difficult to assign a single constitutional theory to one of the current Justices; yet legal scholars who study the Court continually engage in fervent academic debates over the theory that best describes a Justice's approach to his or her decision-making. My project, therefore, is an attempt to join the ongoing conversation and debate by providing an answer for those Court scholars who seek insight into the constitutional philosophy to which the new Chief Justice subscribes, which I suspect extends beyond the baseball diamond and home plate (though I, and other scholars, may discover that a Roberts' opinion seemed to come from 'left field').

A third rationale for my study of Chief Justice Roberts centers on the claims that the Supreme Court frequently engages in policy-making and that Justices often base their decisions, and hence cast their votes, on their individual ideological dispositions, though there are scholars who dispute these claims.[108] Despite the validity or invalidity

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[107] Goldstein, *In Defense of the Text*, 2. Professor Barnett stresses that any Justice must, prior to his or her arrival on the Court, grasp "what role text and original meaning should play in constitutional interpretation in the context of close cases and very difficult decisions. The Supreme Court is no place to confront these issues for the first time." Barnett, "Cronyism," A26.

[108] As Philip Kurland argues, "It can no longer be said that the judiciary is merely juridical in its power; it is now legislative and executive as well." Philip B. Kurland, "Public Policy, the Constitution, and the Supreme Court," *Northern Kentucky Law Review* 12 (1985): 197. For more on the policy-making functions of the Court, see Anawalt, "Choosing Justice," 49-60; Anderson IV and Tahk, "Institutions and Equilibrium," 811-825; Michael Barone, "Justices Have Typically Felt Little Compunction about Overturning Laws and Making Public Policy," *Chicago Sun-Times*, July 13, 2005, 55; Lawrence Baum, "What Judges Want: Judges' Goals and Judicial Behavior," *Political Research Quarterly* 47 (1994): 749-768; Baum, *The Supreme Court*, 3-5; Pamela C. Corley, "Bargaining and Accommodation on the United States Supreme Court," *Judicature* 90 (2007): 157-165; Dahl, "Decision-Making in a Democracy," 279-295; Roy B. Flemming and B. Dan Wood, "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods," *American Journal of Political Science* 41 (1997): 468-498; Mark S. Hurwitz and Drew Noble Lanier, "I Respectfully Dissent: Consensus, Agendas, and Policymaking on the U.S. Supreme Court, 1888-1999," *Review of Policy Research* 21 (2004): 429-445;

of these claims, the Chief Justice is the one member of the Court who can influence the policy-making process of the Court, since the position affords the Chief the opportunity "to steer the Court in a particular direction."[109] One way in which the Chief can accomplish this aim involves the selection of cases the Court elects to hear each term. The Chief leads the Court's conferences at which the Justices meet and discuss the cases

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Kahn, *The Supreme Court and Constitutional Theory*; Thomas Moylan Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004); Keith Krehbiel, "Supreme Court Appointments as a Move-the-Median Game," *American Journal of Political Science* 51 (2007): 231-240; Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: The University of Chicago Press, 1964); Katherine C. Naff, "From *Bakke* to *Grutter* and *Gratz*: The Supreme Court as a Policymaking Institution," *Review of Policy Research* 21 (2004): 405-427; Karen O'Connor, "The Supreme Court and the South," *Journal of Politics* 63 (2001): 701-716; Donald Grier Stephenson, Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999); and, Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington, D.C.: The Brookings Institution, 2006). Not all legal scholars agree with the attitudinalist or behavioralist views of policy-making. See, for example, Cornell W. Clayton, "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman, 15-41. Chicago: The University of Chicago Press, 1999, and Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review* 93 (2007): 1-43. For an early discussion of the behavioralist trend toward evaluating decision-making, see Robert A. Dahl," The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest," *American Political Science Review* 55 (1961): 763-772. Frank Cross identifies the four models of decision-making: legal, political, strategic, and litigant-driven. See Frank B. Cross, "Decisionmaking in the U.S. Circuit Courts of Appeals," *California Law Review* 91 (2003): 1457-1516. Also see Harry T. Edwards, "The Effects of Collegiality on Judicial Decision Making," *University of Pennsylvania Law Review* 151 (2003): 1639-1690.

[109] Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1667. Elliot Slotnick holds a similar belief: "Chief Justices have ample room for pursuing their unique policy concerns through the use of their assignment prerogative." Slotnick, "Who Speaks for the Court," 76. As James Gimpel and Robin Wolpert note, "Who sits on the Court has important implications for the direction of Court policy." James G. Gimpel and Robin M. Wolpert, "Opinion-Holding and Public Attitudes toward Controversial Supreme Court Nominees," *Political Research Quarterly* 49 (1996): 164. There are scholars, however, who refute the notion that the Court or particular Justices can play a policy-making role. For instance, Lee Epstein and his colleagues argue that "the institutional constraints imposed on the Court" by the other branches of government require that the Court "adapt their decisions to the preferences" of the other branches. Epstein, Knight, and Martin, "The Supreme Court as a *Strategic* National Policymaker," 585. Also see Barksdale, "Advise and Consent," 1411-1412.

to accept that came to the Court via writ of certiorari, which is a written petition asking the Supreme Court to hear a case.[110] Additionally, the Chief usually creates a list of cases from the certiorari petitions that the Chief wants the Justices to discuss at length;[111] at times, many of the cases the Chief includes on the list are ones that allow the Chief to advance particular policy goals. While the other Justices participate in the selection and

[110] The primary situations for which the Court accepts cases via writs of certiorari include an instance in which an important issue exists that the Court has yet to decide; when the courts of appeals are in conflict on an issue; when disagreement exists between lower court, circuit court, and Supreme Court precedent; and, when a question arises as to whether the lower court departed from the customary judicial proceedings. See Gregory A. Caldeira and John R. Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court," *American Political Science Review* 82 (1988): 1114. Caldeira and Wright also note that the Supreme Court tends to grant certiorari when an appellate court reverses a lower court ruling, and when a decision from the court immediately below generates one or more dissents. For more on the case selection process, see Saul Brenner and John F. Krol, "Strategies in Certiorari Voting on the United States Supreme Court," *Journal of Politics* 51 (1989): 828-840; Stephen G. Breyer, "Reflections on the Role of Appellate Courts: A View from the Supreme Court," *Journal of Appellate Practice and Process* 8 (2006): 91-97; and, William H. Rehnquist, *The Supreme Court*, Rev. ed. (New York: Vintage Books, 2002), 224-238. On the influence of the Solicitor General and the Court's certiorari acceptance, see Michael A. Bailey, Brian Kamoie, and Forrest Maltzman, "Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making," *American Journal of Political Science* 49 (2005): 72-85; Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Vintage Books, 1988); Louis Fisher, "Is the Solicitor General an Executive or a Judicial Agent? Caplan's *Tenth Justice* [book review]," *Law & Social Inquiry* 15 (1990): 305-320; Stephen S. Meinhold and Steven A. Shull, "Policy Congruence Between the President and the Solicitor General," *Political Research Quarterly* 51 (1998): 527-537; Karen O'Connor, "The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation," *Judicature* 66 (1983); 256-264; and, Jeffrey A. Segal and Cheryl D. Reedy, "The Supreme Court and Sex Discrimination: The Role of the Solicitor General," *Western Political Quarterly* 41 (1988): 553-568. For more on the case selection process, including the "Rule of Five," or the number of Justices who must vote "yes" to hear a case, see H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (Chicago: University of Chicago Press, 2008).

[111] As Martin Mayer notes, "Arguably the most important part of the chief justice's job is that he lays out the case for all the judges when the petition to appeal is filed." Mayer, *The Judges*, 136. Also see Gregory A. Caldeira and John R. Wright, "The Discuss List: Agenda Building in the Supreme Court," *Law & Society Review* 24 (1990): 807-836, and Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1669-1672, 1680. For more on writ of certiorari, writ of certification (a request from a lower federal court), and writ of appeal (cases that arrive via the federal courts of appeal), see Brian L. Porto, *May It Please the Court: Judicial Processes and Politics in America* (New York: Addison-Wesley Educational Publishers Inc., 2001), 38-39.

discussion process, these two benefits that result from holding the Chief Justice's seat afford the Chief with the opportunity to influence the final docket of cases the Court agrees to hear each term and therefore reflects the Chief's agenda-setting power in the case selection process.

While the Chief may hold a pre-docket agenda-setting power, the Chief also may bring an agenda-setting power to the conferences at which the Justices meet to discuss and vote on the outcome of the cases argued before the Court. Again, the Chief leads the conference discussions and usually speaks first during these meetings, which allows the Chief to frame and structure the subsequent discussion about the case.[112] By doing so, the Chief attempts to sway the other Justices toward resolving and voting on a case consistent with the Chief's position on that case. While the Justices cast their final votes on a case at a later conference meeting,[113] and the position each Justice takes on a case often depends on that Justice's own "ideological and policy preferences"[114] and/or on the

[112] See Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1668-1669, and Wahlbeck, "Strategy and Constraints," 1731.

[113] One factor that generates criticism regarding the Court's decision-making process is that "justices change their minds between the start of discussion and the preparation of written opinions." Mayer, *The Judges*, 309. As a result, as Brian Porto notes, "justices do not try to persuade their colleagues of the correctness of their views in conference; they do that in their written opinion drafts instead." Porto, *May It Please the Court*, 41. Law Professor Stephen Calabresi offers a criticism of the process: the Justices "vote on cases without actually debating them," and they do not "actually deliberate with one another before they vote or join opinions." Calabresi, "Don't Split the Baby," A7. For a concise account of the Justices' bargaining practices, see Paul J. Wahlbeck, James F. Spriggs, II, and Forrest Maltzman, "Marshalling the Court: Bargaining and Accommodation on the United States Supreme," *American Journal of Political Science* 42 (1998): 294-315, and Maltzman, Spriggs, II, and Wahlbeck, "Strategy and Judicial Choice."

[114] Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1670. Lawrence Baum offers a similar assessment: "But policy preferences certainly provide the best explanation for differences in the positions that the nine justices take in some cases, because no other factor varies so much from one justice to another." Baum, *The Supreme Court,* 121. Reaching a similar conclusion, Robert Dorff and Saul

Brenner conclude, "[T]he justices are people who bring their own personal policy preferences into a group decision-making context in which they must interact with other people who have their own personal policy preferences." Robert H. Dorff and Saul Brenner, "Conformity Voting on the United States Supreme Court," *Journal of Politics* 54 (1992): 774. For more on the Court's policy-making, see Corley, "Bargaining and Accommodation on the United States Supreme Court," 157-165; Stephen M. Feldman, "The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making," *Law & Social Inquiry* 30 (2005): 89-135; Roy B. Flemming, B. Dan Wood, and John Bohte, "Attention Issues in a System of Separated Powers: The Macrodynamics of American Policy Agendas," *Journal of Politics* 61 (1999): 76-108; Thomas G. Hansford and James F. Spriggs, II, *The Politics of Precedent on the U.S. Supreme Court* (Princeton, N.J.: Princeton University Press, 2006); Maltzman, Spriggs, II, and Wahlbeck, *Crafting Law on the Supreme Court*; Kevin T. McGuire and Barbara Palmer, "Issues, Agendas, and Decision Making on the Supreme Court," *American Political Science Review* 90 (1996): 853-865; David W. Rohde, "Policy Goals and Opinion Coalitions in the Supreme Court," *Midwest Journal of Political Science* 16 (1972): 208-224; James F. Spriggs, II, and Thomas G. Hansford, "The U.S. Supreme Court's Incorporation and Interpretation of Precedent," *Law & Society Review* 36 (2002): 139-160; and, Wrightsman, *The Psychology of the Supreme Court*, 177-198. On how amicus curiae briefs influence the Justices' ideological and policymaking preferences, see Robert C. Bradley and Paul Gardner, "Underdogs, Upperdogs and the Use of the Amicus Brief: Trends and Explanations," *The Justice System Journal* 10 (1985): 78-96; Gregory A. Caldeira and John R. Wright, "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?" *Journal of Politics* 52 (1990): 782-806; Caldeira and Wright, "Organized Interests and Agenda Setting," 1109-1127; Paul M. Collins, Jr., "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation," *Law & Society Review* 38 (2004): 807-832; Paul M. Collins, Jr., and Lisa A. Solowiej, "Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court," *Law & Social Inquiry* 32 (2007): 955-984; Charles R. Epp, "External Pressure and the Supreme Court's Agenda," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman, 255-279 (Chicago: The University of Chicago Press, 1999); Lee Epstein and Jack Knight, "Mapping Out the Strategic Terrain: The Informational Role of *Amici Curiae*," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman, 215-235 (Chicago: The University of Chicago Press, 1999); Victor E. Flango, Donald C. Bross, and Sarah Corbally, "Amicus Curiae Briefs: The Court's Perspective," *Justice System Journal* 27 (2006): 181-190; Joseph D. Kearney and Thomas W. Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court," *University of Pennsylvania Law Review* 148 (2000): 743-855; Kelly J. Lynch, "Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs," *Journal of Law & Politics* 20 (2004): 33-75; and, James F. Spriggs, II, and Paul J. Wahlbeck, "Amicus Curiae and the Role of Information at the Supreme Court," *Political Research Quarterly* 50 (1997): 365-386. On how the Justice's use oral argument before the Court to advance their preferences, see Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* (Albany: State University Press of New York, 2008); Rehnquist, *The Supreme Court*, 239-251; Stephen M. Shapiro, "Oral Argument in the Supreme Court of the United States," *Catholic University Law Review* 33 (1984): 529-553; Sarah Levien Shullman, "The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions during Oral Argument," *Journal of Appellate Practice and Process* 6 (2004): 271-293; Stephen L. Wasby, Anthony D'Amato, and Rosemary Metrailer, "The Functions of Oral Argument in the U.S. Supreme Court," *Quarterly Journal of Speech* 62 (1976); 410-422; and, Wrightsman, *Oral Arguments before the Supreme Court*.

content contained within the final draft of another author's opinion,[115] the fact remains that the Chief Justice plays a large role in attempting to shape the discussion, voting, and opinion authorship processes.[116] Recognizing that "the justices' opinion writing is classic judicial policymaking,"[117] the Chief Justice's ability to assign the Court's majority opinion and to influence the content of other opinions allows the Chief "to direct the Court's policy-making agenda"[118] while simultaneously easing the polarization on the

[115] For example, in their study of the Burger Court, Theodore Arrington and Saul Brenner conclude, "it probably makes more sense to conform after the justices read one or more drafts of the majority and other opinions. At this time, the justices will be in a better position to determine whether it is more beneficial to her to conform or to dissent." See Arrington and Brenner, "Strategic Voting for Damage Control," 572. Also see Baum, *Judges and Their Audiences*, 50-53; Stephen M. Feldman, "The Rule of Law or the Rule of Politics?" 89-135; and, James F. Spriggs, II, Forrest Maltzman, and Paul J. Wahlbeck, "Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Assignment," *Journal of Politics* 61 (1999): 485-506.

[116] For more on the Chief Justice's influence, see G. Edward White, "The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy," *University of Pennsylvania Law Review* 154 (2006): 1463-1510. As White notes, "In short, the Court's current protocols make opinion assignment a more delicate, and arguably a more important, power than it was for most of the Court's history" (p. 1507). Also see Kevin M. Scott, "Shaping the Supreme Court's Federal Certiorari Docket," *Justice System Journal* 27 (2006): 191-207.

[117] Hurwitz and Lanier, "I Respectfully Dissent," 430. Hurwitz and Lanier also conclude that a Justice's decision as to whether to write a concurring or dissenting opinion depends on that Justice's policy goals. For a general discussion of opinion writing, see van Geel, *Understanding Supreme Court Opinions*, 37-47, and Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings," *University of Chicago Law Review* 62 (1995): 1371-1419. On a Justice's decision to write a separate opinion for the Court, see David M. O'Brien, "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman, 91-113 (Chicago: The University of Chicago Press, 1999).

[118] Wahlbeck, "Strategy and Constraints," 1730. Wahlbeck also notes that majority opinion assignment is "a means by which the Chief Justice pursues his policy goals" (p. 1733). Perhaps more importantly, selection of an author for the opinion "affects the policy content of the opinion as well as the breadth of the legal doctrine." Maltzman, Spriggs, II, and Wahlbeck, "Strategy and Judicial Choice," 54. For more on opinion assignment and policy-making, see Maltzman, Spriggs, II, and Wahlbeck, *Crafting Law on the Supreme Court*; Forrest Maltzman and Paul J. Wahlbeck, "A Conditional Model of Opinion Assignment on the Supreme Court," *Political Research Quarterly* 57 (2004): 551-563; and, Forrest Maltzman and Paul

Court. It seems a worthwhile goal, therefore, to explore how Chief Justice John Roberts engages in agenda-setting and whether his leadership affects the policy-making features of the Court since the Chief Justice's influence can "shift the Court's decisions in a particular direction over time."[119]

A fourth rationale for my study of the Chief Justice and the Supreme Court addresses the public's knowledge—or lack thereof—of the Court. In an age where the public can access video via cellular phones and the Internet,[120] the practices of the Court seem arcane and out of step with the technological advances and devices present during the twenty-first century. The Supreme Court does not televise its proceedings;[121] the closest an interested person can come to 'watching' the oral arguments before the Court requires tuning to the cable channel C-SPAN, where one can 'listen' to a Justice speak

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J. Wahlbeck, "Opinion Assignment on the Rehnquist Court," *Judicature* 89 (2005): 121-126, 181. On the agenda setting process, see Joel B. Grossman and Charles R. Epp, "Agenda Formation on the Policy Active U.S. Supreme Court," in *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court*, ed. Ralf Rogowski and Thomas Gawron, 103-124 (New York: Berghahn Books, 2002), and H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991).

[119] Cross and Lindquist, "Doctrinal and Strategic Influences of the Chief Justice," 1679. For general comments relevant to Chief Justice Roberts that "extrapolate lessons" from this agenda setting and policy-making perspective, see Wahlbeck, "Strategy and Constraints," 1754-1755.

[120] For an interesting view on Internet blogs and the Roberts and Alito confirmation hearings, see Marcia Coyle, "Evaluating the New Justices in Light of the Confirmation Ordeal," *Pepperdine Law Review* 34 (2007): 621-625.

[121] As one editorial noted, "news shows might use short snippets of oral arguments out of context," and "the main cost of the justices' ongoing camera shyness . . . is to inhibit robust, timely, and well-informed discourse on the important, often vexing legal and social issues that land at the court." See "The Supreme Court Club," *New York Times*, January 16, 2008, A22. For an Associate Justice's perspective on the rationale behind prohibiting cameras in the Court, see Breyer, "Reflections on the Role of Appellate Courts," 97-98.

while staring at a still photograph of the Justice who is speaking.[122] Consequently, unless a member of the public is fortunate enough to visit Washington D.C. and can gain access to one of the limited seats within the hallowed building where oral arguments take place, where the Justices query the counsels for the plaintiff and defendant, and where the Justices may orally deliver an opinion from the bench, few members of the public actually witness the day-to-day business that takes place within the nation's highest court. One of the only times at which the public has the ability to watch a (potential) Supreme Court Justice 'in action' occurs during that nominee's televised confirmation hearings. Unfortunately, "[t]elevised hearings now escalate the potential for conflict" during the confirmation process,[123] and thus the time at which the public learns the most about the Court and focuses its attention on the Court (and thereby formulates an opinion about the Court and the judicial branch) occurs during protracted battles over a contentious nomination.[124] In the absence of regular media coverage, Professor Stephen Burbank reports that academic studies continually conclude "that the public knows very little about the Court or its decisions."[125] According to Burbank, what little knowledge

[122] As two Court followers noted, "oral arguments . . . are the only chance the public has to see the justices in action." Jess Bravin and Justin Scheck, "Look for Sotomayor to Add Heat," *Wall Street Journal*, June 2, 2009, A4.

[123] Silverstein, "Bill Clinton's Excellent Adventure," 137.

[124] See Friedman, "Tribal Myths," 1317, and Gimpel and Wolpert, "Opinion-Holding and Public Attitudes," 164.

[125] Stephen B. Burbank, "The Selection, Tenure, and Extrajudicial Authority of the Chief Justice and Other Justices: Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices," *University of Pennsylvania Law Review* 154 (2006): 1527. As Martin Mayer comments, "Most Americans don't know the name . . . of any justice on the United States Supreme Court." Mayer, *The Judges*, 197. Stephen Carter

the public acquires comes via the mass media, and that "knowledge of the Court's decisions" largely depends on "the extent and duration of the media coverage and the perceived salience of the contested issue."[126] Given that the Supreme Court's decisions both directly and indirectly impact the public at large, it seems prudent to provide a comprehensive study that illuminates the Supreme Court, discusses the impact that the

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offers an equally dismal assessment: "For most of the people, most of the time, Constitution and Court alike are dimly seen, indistinguishable abstracts." Carter, "The Confirmation Mess," 1190. Josina Makau echoes Carter's claim, and she notes that one of the audiences for the Court's decisions is "educated members of the body politic." See Josina M. Makau, "The Supreme Court and Reasonableness," *Quarterly Journal of Speech* 70 (1984): 381. Another scholar commented, "Although these [Supreme Court] opinions are available to anyone, they are not read, and a precious few public citizens and journalists watch oral arguments in the Supreme Court. Television coverage is nearly nonexistent." Martin Grabus, *The Next 25 Years: The New Supreme Court and What It Means for Americans* (New York: Seven Stories Press, 2007): 3. Another legal scholar notes, "Supreme Court opinions have little apparent effect upon public opinion." Christopher L. Eisgruber, "Is the Supreme Court and Educative Institution?" *New York University Law Review* 67 (1992): 963. Also see David L. Gregory, "Judging the Justice in the Television Age," *St. John's Journal of Legal Commentary* 7 (1991): 105-107, and Barbara A. Perry, *The Priestly Tribe: The Supreme Court's Image in the American Mind* (Westport, CT: Praeger, 1999). It seems the Court knows more about the public's mood than the public knows about the Court's mood. See, for example, Flemming and Wood, "The Public and the Supreme Court," 468-498.

[126] Stephen B. Burbank, "The Selection, Tenure, and Extrajudicial Authority of the Chief Justice and Other Justices," 1528. Thirty years ago, as Gregory Casey reported, "[Regarding] a given Supreme Court decision . . . Few read it; some may read an account of it in a newspaper, perhaps even read excerpts; others may read only a cryptic article or headline or hear of it on the broadcast media; and many may never hear of it. . . . Confusion can easily result as various sectors of the public acquire divergent and conflicting information on the decision's content." Irving Kaufman offered a similar claim, and he commented that the mass media reports "only the barest outlines of the decisions," and that coverage of the Court's decisions by television and the press "is all too often inaccurate or superficial." Law Professor Philip Kurland offered a more scathing attack on the media: "[T]he most appropriate adjective I can propose for the press coverage of the Supreme Court is 'abominable.' Were I not fairly sure that the cause is ineptitude, I should suspect malevolence." See Gregory Casey, "Popular Perceptions of Supreme Court Rulings," *American Politics Quarterly* 4 (1976): 4-5; Irving R. Kaufman, "Helping the Public Understand and Accept Judicial Decisions," *American Bar Association Journal* 63 (1977): 157; and, Philip B. Kurland, "On Misunderstanding the Supreme Court," *University of Chicago Law School Record* 9 (1960): 31. Based on my research, these charges against the media largely ring true even today. For more on the 'secrecy' of the Court, see Everette E. Dennis, "How the Press Fails the Supreme Court," *Christian Science Monitor*, February 21, 1979, 22, and Robert E. Drechsel, "Accountability, Representation and the Communication Behavior of Trial Judges," *Western Political Quarterly* 40 (1987): 685-702.

new Chief Justice might make on the Court, and more importantly, examines and dissects a variety of published opinions, many of them unheralded and underreported by the media, in a manner in which lay readers can understand them, and hopefully, can become more interested in closely following the proceedings and the outcomes of the nation's High Court.

The final rationale for my project, and perhaps the rationale most important to this author, is restoring honor to the term "rhetoric"—especially when speaking of "legal rhetoric" and "judicial rhetoric." At the same time, I hope to dismantle "the popular pejorative" connotations (and permutations) associated with the term.[127] Far too often, individuals who closely follow the Court and scrutinize the Court's opinions rebuke the Justices for their use of 'rhetoric,' even though the term rarely receives definition or qualification as to why its use deserves disdain.[128] Judge Richard Posner, himself a staunch critic of the Justices' writings, offers valuable insight into the dilemma faced by those who examine judicial opinions: "[M]uch of the current writing on the rhetoric of judicial opinions reflects a still broader usage in which rhetoric assumes ethical

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[127] Erwin Chemerinsky, "The Rhetoric of Constitutional Law," *Michigan Law Review* 100 (2002): 2008. One scholar's study reflects the extent of the disdain for "rhetoric." In the study, the scholar used the LegalTrac online database and conducted a search using the word "rhetoric." The search returned 900 law review and professional journal articles in which "rhetoric" appeared in abstract, key word, or title lists. According to the scholar, "Altogether, rhetoric in its impoverished sense constituted the theme of 400 of the 900" articles from the search. See Frances J. Ranney, "Sizing Up Legal 'Rhetoric': Law from the Outside In," in *Sizing Up Rhetoric*, ed. David Zarefsky and Elizabeth Benacka, 141-152 (Long Grove, IL: Waveland Press, Inc., 2008), 142.

[128] On the lack of providing a definition for "rhetoric" when critiquing its use in legal scholarship, see Ranney, "Sizing Up Legal 'Rhetoric.'" On the problem of defining 'rhetoric' and the wide array of definitions for the term, see David W. Smit, "The Uses of Defining Rhetoric," *Rhetoric Society Quarterly* 27 (1997): 39-50.

overtones (absent from Aristotle), so that to praise or criticize the rhetoric of a judicial opinion is virtually synonymous with praising or criticizing the opinion, period."[129] Another legal scholar laments, "To the extent that the rhetorical practices of our times require some muffling of the language of rights and the language of duties, rhetoric impedes truly serious legal argument."[130] Perhaps Susan Burgess best captures how many people within the legal community view the use of 'rhetoric':

> [P]olitical actors use law or legal rhetoric to manipulate political outcomes to their favor. . . . According to the dominant view, legal rhetoric cannot foster or locate shared understanding in the community. . . . Legal rhetoric is nothing more than judicial mystification or manipulation of the law.[131]

The critique of a judicial opinion and a Justice's use of 'rhetoric,' which often remains undefined in the piece of criticism, too often centers not on the arguments contained within the opinion, but rather on the critic's view of the 'rightness' or 'wrongness' of an opinion, based on the critic's predisposition toward how the Court *should have* decided the case. For these critics, and others who share their views, Plato's attacks against the

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[129] Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, MA: Harvard University Press, 1988), 271. Posner does, though, offer his own criticism of the use of rhetoric within the judicial opinion: "A more serious objection to trying to improve the style of judicial opinions is that style, and more broadly rhetoric, are amoral in point of both means and ends. The purpose of rhetoric is to persuade, and we have seen that emotive, nonrational [sic]—even false and misleading—rhetorical devices abound for persuading." See Posner, *Law and Literature: A Misunderstood Relation*, 298.

[130] Quinn, "Argument and Authority in Common Law Advocacy and Adjudication," 665. Martin Mayer offers a similar claim: "Instead of discussing the legal profession and the court system we have, we wander in a haze of rhetoric about the rule of law and the role of law, equal justice under law, the adversary system as a search for truth, fair trials, due process, et. cetera. This rhetoric is false, and in no small part dishonest." See Mayer, *The Judges*, 29-30.

[131] Susan R. Burgess, "Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, & Judicial Supremacy," *Polity* 25 (1993): 445-446. I do note that Burgess disagrees with this view.

purveyors of rhetoric[132] rule the day and Aristotle's primer on the value of rhetoric and argument[133] remains safely tucked away on the bookshelf.

My project, however, advances both a more objective and more clearly defined definition of 'rhetoric' as used in judicial opinions, and the project advocates for an interdisciplinary approach to studying the law, an approach that argues that communication scholars can use an interpretive methodology, grounded in the legal field's argument types, to examine Court opinions and reveal how judicial rhetoric functions both internal to, and external of, the text. Such a project appears justified, since many legal scholars agree that "rhetorical criticism can be a powerful response to legal discourse."[134] Given that several legal scholars' work examines Court opinions using

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[132] See, for example, James H. Nichols, Jr., *Plato: Gorgias* (Ithaca, New York: Cornell University Press, 1998), and James H. Nichols, Jr., *Plato: Phaedrus* (Ithaca, New York: Cornell University Press, 1998).

[133] See George A. Kennedy, *Aristotle On Rhetoric: A Theory of Civic Discourse* (New York: Oxford University Press, 1991).

[134] "Forum: Rhetorical Criticism of Legal Texts: Four Rhetoricians on *Lochner* v. *New York*," *Hastings Constitutional Law Quarterly* 23 (1996): 619-620. For views from legal scholars advocating the rhetorical criticism of legal texts, see Chemerinsky, "The Rhetoric of Constitutional Law," 2008-2035; Marc E. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada," *Supreme Court Law Review* 7 (1985): 455-510; Peter Goodrich, "Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language," *Oxford Journal of Legal Studies* 4 (1984): 88-122; Peter Goodrich, "Historical Aspects of Legal Interpretation," *Indiana Law Journal* 61 (1986): 331-354; Leigh Hunt Greenhaw, "'To Say What the Law Is': Learning the Practice of Legal Rhetoric," *Valparaiso University Law Review* 29 (1995): 861-896; Bruce McLeod, "Rules and Rhetoric," *Osgoode Hall Law Journal* 23 (1985): 305-329; Eileen A. Scallen, "Judgment, Justification and Junctions in the Rhetorical Criticism of Legal Texts," *Southern Communication Journal* 60 (1994): 68-74; and, Gerald B. Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1545-1597. From a communication scholar's perspective, see Anita Shmukler, "Some Challenges to the Student of Rhetoric and Law," *Today's Speech* 18 (1970): 45-47.

Lloyd Bitzer's conception of the 'rhetorical situation,'[135] I believe communication scholars can contribute equally valuable work to the legal field. In fact, one of the crucial ways to overcome the "strong pejorative connotations" associated with the term 'rhetoric' involves examining "legal interpretation as [a] particular type of argumentation."[136] My project, therefore, aims to answer this call.

Judge Roberts: The Newest Stealth Candidate?

To address the larger questions associated with studying the Supreme Court, this project aims to answer a crucial question, and one related to what many viewed as President Bush's rationale for selecting his candidate for the position of Chief Justice: Was Judge John G. Roberts truly a 'stealth candidate' lacking a paper trail for Senate Judiciary Committee members, the media, and interested Court followers to examine? Consider that shortly after Roberts' nomination to the Court, *Newsweek* offered the following assessment regarding Roberts' paper trail: "Efforts to predict his future Supreme Court votes from past judicial opinions and legal writings . . . have proved mostly fruitless or meaningless."[137] Two other reporters suggested that anyone who

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[135] See, for example, Gold, "The Mask of Objectivity," 455-510; Greenhaw, "'To Say What the Law Is,'" 861-896; Linda Levine and Kurt M. Saunders, "Thinking Like a Rhetor," *Journal of Legal Education* 43 (1993): 108-122, and Robert A. Prentice, "Supreme Court Rhetoric," *Arizona Law Review* 25 (1983): 86.

[136] Eileen A. Scallen, "American Legal Argumentation: The Law and Literature/Rhetoric Movement," *Argumentation* 9 (1995): 707-708. Also see Eileen A. Scallen, "Presence and Absence in *Lochner*: Making Rights Real," *Hastings Constitutional Law Quarterly* 23 (1996): 621-626.

[137] Thomas and Taylor, Jr., "Judging Roberts," 24. Comiskey likewise suggests that analyzing "published opinions . . . offers only limited promise," and he notes that reading opinions from federal judges has "proved unhelpful," and opinions from "federal appeals court judge[s] may reveal surprisingly little." See Comiskey, "Can the Senate Examine the Constitutional Philosophies of Supreme Court Nominees?" 498.

analyzed Roberts' "relatively few appellate-court opinions found a genuinely cautious judge, a hard-to-attack model of nonactivism [sic] deferential to the will of legislatures and the presidency."[138] During the Judiciary Committee's hearings, senators attempted to explore these concerns, but most Court watchers concluded that the hearings failed to reveal Roberts' judicial philosophy and how he would vote on a particular case.

That the Judiciary Committee failed to achieve its goals presents an interesting quandary given the access to information about a nominee the senators acquire before the confirmation hearings commence. Prior to a nominee's appearance before the Committee, each senator has his or her aides prepare a briefing book on the candidate that becomes "a veritable library on the nominee."[139] The aides tailor the briefing book to "the particular needs of the senator," and the book usually consists of "reference sources [that] will provide background information on the nominee, on significant political and constitutional issues likely to catch the senator's attention, and other relevant matters" so that the senator can find the information and "process it easily."[140] The senators, then, use their briefing books throughout the hearings, drawing from the books the pertinent information about which they want to query the nominee. To

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As discussed earlier in this chapter, this project aims to test these claims regarding Roberts' speeches and writings.

[138] Howard Fineman and Debra Rosenberg, "Threading the Needle," *Newsweek*, August 1, 2005, 30. Similarly, an editorial in *USA Today* noted that Roberts' record includes "40 largely non-controversial opinions." See "Does Roberts Represent Mainstream Law, Values?" *USA Today*, July 20, 2005, 11A.

[139] Watson and Stookey, *Shaping America*, 138.

[140] Watson and Stookey, *Shaping America*, 139.

confirm whether Senators utilized a briefing book for the Roberts' hearings, I placed a telephone call to the office of Vermont Senator Patrick Leahy, the chairman of the Senate Judiciary Committee, and I spoke with one of Leahy's aides involved in preparing Leahy for Roberts' confirmation hearings. Leahy's aide asked the other senatorial aides in his (the aide's) office, and the aide confirmed that all of the aides had prepared briefing books for their respective senators.

While the briefing books provide senators with a valuable tool for their use during the hearings, in reality the books only provide a largely condensed record of the nominee's entire paper trail. In fact, most senators do not read every artifact generated during the entirety of a nominee's career. More revealing, however, is that even with an abridged library, in many cases, senators (and their staff) lack the knowledge to vet successfully the most relevant information about a nominee on which to query the candidate.[141] Considering these limitations offers an opportunity to investigate the claim that John Roberts lacked a paper trail and therefore entered the confirmation process as a stealth candidate.

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[141] Based on the extant literature regarding the Senator's handling of Roberts's confirmation hearings, this project sides with Stephen Carter's assessment:

> Senators and their staff members will not have read deeply or broadly in the literature on judicial philosophy or adjudication or interpretation; even if they have, they will be unlikely to have the scholarly turn of mind vital to making sense of it all. This is no knock on the senators; it is, if anything, a knock on the notion that something as obscure and subtle as "judicial philosophy" is a sensible measuring stick for use in the essentially political process of selecting judges.

Carter, "The Confirmation Mess," 1195.

My project, therefore, advances the position that rather than questioning a nominee with a paper trail carefully hidden by the Bush administration, senators on the Judiciary Committee did, in fact, have access to a vast corpus of documents written by and relating to Roberts.[142] In advancing this position, my project proceeds in what I term a "chronologically archival" fashion; that is, to support my contention that Roberts did, in fact, provide Senators and Court watchers with an extensive paper trail to investigate, I chronologically track Roberts' political and judicial career and I examine the archival texts that Roberts' generated during his career.

Unlike those who vetted Roberts' paper trail and concluded that Roberts lacked a lengthy paper trail, this project contends that a chronologically archival investigation reveals that Roberts left an extensive paper trail for the Judiciary Committee to investigate. Two archival text data sources exist to support this project's contention.

The first time period, or the pre-judicial period, to investigate from Roberts' career involves examining the relevant texts from Roberts' service during the Reagan

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[142] One point of contention, for example, involved the Bush administration's denial of access to Roberts' writings when he served as the deputy solicitor general during the George H.W. Bush administration. Senator Edward Kennedy, for example, wrote: "The White House concealed information about its nominees. . . . The Senate should insist on having the same access as the administration does to the nominees' writings and other relevant documents, and it should receive those records before the confirmation hearing begins." Edward M. Kennedy, "The Supreme Court's Wrong Turn—And How to Correct It," *American Prospect*, December 2007, 17-18. It is worth noting, however, that the records in question actually were withheld as a result of an executive order President George W. Bush signed in 2001. See "Reagan-Era Roberts Documents Released," *American Libraries*, October 2005, 13. For more on the withholding of records, see Jo Becker, "Roberts Papers Being Delayed," *Washington Post*, August 10, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/08/09/AR200508091232.html, (accessed September 12, 2008); "White House Won't Release All Roberts Records," http://www.msnbc.msn.com/id/8689573 (accessed May 19, 2008); and, "Umpires," 5. Additionally, as Toobin notes, "reporters obtained access to about 75,000 pages of documents from Roberts's days as a young lawyer in the Reagan White House." See Toobin, *The Nine*, 280.

and Bush administrations, and the National Archives & Records Administration (NARA), the governmentally-charged organization responsible for cataloguing and making available to the public all of the documents from a president's administration, provides the first data source for examination. Despite Senator Kennedy's claims that the Bush administration refused to release documents relating to Roberts' political service, and at the Judiciary Committee's request, the NARA released from the Ronald Reagan Presidential Library and Museum, and therefore made public and open for investigation, almost 61,500 pages of documents from John Roberts' service during the Reagan administration.[143] The George Bush Presidential Library and Museum in College Station, Texas, also made documents available; however, the library had far fewer records available for examination. The pre-judicial period also includes an examination of any articles Roberts wrote and any speeches he delivered during his tenure with the two administrations.

The second time period, or the judicial period, to investigate from Roberts' career involves discovering the relevant texts from Roberts' two-year tenure as a judge on the U.S. Court of Appeals for the District of Columbia. The January 29, 2003, confirmation hearings[144] for a seat on the appellate court and the eighty-one pages of questionnaire responses Roberts provided to the Committee, as well as his published opinions from his term as an appellate court judge, provide the second data source for

[143] The document releases occurred in several stages. On August 18, the NARA released 38,000 pages; on September 2, it released 18,000 pages. See "Reagan-Era Roberts Documents Released," 13.

[144] See U.S. Congress, Senate, Committee on the Judiciary, *Confirmation Hearing on Federal Appointments*, 108th Congress, First Session, January 29, 2003: 297-339, 412-461.

examination. Again, this data source also includes an examination of any articles Roberts wrote and any speeches he delivered during his tenure an as an appellate court judge.

Approaching the study of the new Chief Justice and investigating whether he entered his confirmation hearings as a stealth candidate via a chronologically archival method holds promise for several reasons. As several legal and political science scholars note, articles, speeches, and opinions written by nominees offer fertile ground for analyzing a nominee's ideological leaning, judicial philosophy, and their potential stance on cases that come before the Court.[145] My project investigates Roberts' paper trail in a manner consistent with these scholars' views, and it expands their ground by including advisory and position papers, letters, memoranda, and other writings by Roberts while he served in the Reagan and Bush administrations. By examining the relevant artifacts that Roberts' authored that relate to the judicial branch, I aim to discover the types of argumentative and rhetorical strategies that Roberts utilized when advocating a particular position, and to discern whether his advocacy reveals an ideological tilt or a

[145] Segal and Cover, "Ideological Values," 560-561. Albert Melone offers a similar claim: Nominees' "publications including law review and other writings can serve to reveal a wealth of attitudinal information." Melone, "Judicial Discretion and the Senate's Role in Judicial Selection," 564. Also see Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Harold J. Spaeth, "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," *Journal of Politics* 57 (1995): 812-823, and Williams and Baum, "Questioning Judges about Their Decisions," 73-80. Arthur Leonard, a Professor of Law at New York Law School, goes so far as to suggest that Senate end its practice of questioning nominees and instead focus on the nominee's public record, such as opinions that are accessible via LEXIS or Westlaw; articles and commentary found within law reviews and public affairs journals; and, articles from daily newspapers and weekly newsmagazines. See Leonard, "A Proposal to Reform the Process for Confirming Justices," 196-198.

judicial philosophy. Most important, such an approach allows the project to answer three questions that address the central points contained within this chapter:

(1) Was Judge John G. Roberts truly a 'stealth candidate' lacking a paper trail for Senate Judiciary Committee members, the media, and interested Court followers to examine?

(2) What types of argumentative and rhetorical strategies does Roberts utilize in his oral and written discourse to justify a position on a constitutional or legal issue?

(3) Do Roberts' pre-Court argumentative and rhetorical strategies reveal his judicial temperament and constitutional philosophy?

At the same time, approaching the study of the new Chief Justice would be incomplete without examining Roberts' eighty-three page response to the Judiciary Committee's questionnaire[146] prior to his first scheduled confirmation hearings for a seat as an Associate Justice, as well as his testimony during his confirmation hearings for the Chief Justice's seat. A complete investigation also requires an examination of the opinions Roberts' wrote as a member of the Court. As David Scott and Robert Gobetz suggest, "If the language a rhetor uses reveals something about the rhetor, then the

[146] The content of Roberts' answers to the questionnaire include a list of delivered speeches and granted interviews; a list of the 39 cases he argued before the Supreme Court between 1986 and 2003; a list of his amicus curaie briefs filed with the Court; a list of his published and unpublished opinions; and, his response to a question on the "criticism" of "judicial activism." One Republican involved in the efforts to seat Roberts on the Court wrote, "I had seen his picture and read a four-inch binder full of his writings and background." Whether the Judiciary Committee had access to this same binder remains doubtful. See Edward Gillespie, *Winning Right: Campaign Politics and Conservative Policies* (New York; Threshold Editions, 2006), 190.

published opinions of the Court represent a reasonable, and tangible, source of data."[147]

Roberts' appellate court and Supreme Court opinions, therefore, provide two additional fertile sources from which to discover a potential ideological leaning, the argumentative and rhetorical strategies, and a potential judicial philosophy of the new Chief Justice.[148] At the same time, some scholars argue that the "relatively younger and relatively less experienced Justices" pen a majority of the Court's opinions, especially during their second year on the Court,[149] while several other legal scholars note that "the

[147] Scott and Gobetz, "The U.S. Supreme Court 1969-1992," 212. The authors also contend that the Court's opinions influence "applied legal discourse" and the legal profession itself (p. 221). William Domnarski argues that how a judge writes an opinion reveals that judge's ideology. See William Domnarski, "The Tale of the Text: The Figurative Prose Style of Connecticut Supreme Court Justice Leo Parskey," *Connecticut Law Review* 18 (1986): 459-466. For additional discussions on the value of judicial opinions, see James Boyd White, "What's an Opinion For?" *University of Chicago Law Review* 62 (1995): 1363-1369.

[148] Law professor L.A. Powe agrees that an appellate court justice's written opinions provide a wealth of information about the nominee, since those opinions center on major issues, they reveal how a judge interprets precedent, and they may reveal a judge's social philosophy. See Powe, Jr., "The Senate and the Court," 896. Albert Melone advances a similar position and suggests "studying the published opinions of nominees with prior judicial experience [as this] may reveal consistent attitude patterns," which in turn "may serve as indicators of likely future behavior." Additionally, Melone argues that nominees' "opinions can serve to uncover not only policy views, but also nominees' conceptions of the proper judicial role." Melone, "The Senate's Confirmation Role in Supreme Court Nominations," 79.

[149] See Elliot E. Slotnick, "Judicial Career Patterns and Majority Opinion Assignment on the Supreme court," *Journal of Politics* 41 (1979): 643-644. Timothy Hagle suggests that new Justices undergo an acclimation period on the Court before they begin writing more concurring and dissenting opinions. Timothy M. Hagle, "'Freshman Effects' for Supreme Court Justices," *American Journal of Political Science* 37 (1993): 1142-1157. Mark Hurwitz and Joseph Stefko make a similar finding in their study, which concludes that as a result of an acclimation process, new justices on the Court are more likely to comply with precedent. See Mark S. Hurwitz and Joseph V. Stefko, "Acclimation and Attitudes: 'Newcomer' Justices and Precedent Conformance on the Supreme Court," *Political Research Quarterly* 57 (2004): 121-129. Saul Brenner concludes that first-year Justices are assigned majority opinion writing in salient cases far less often than the more tenured Justices. See Saul Brenner, "Majority Opinion Assignment in Salient Cases on the U.S. Supreme Court: Are New Associate Justices Assigned Fewer Opinions?" *Justice System Journal* 22 (2001): 209-221. Also see Saul Brenner and Timothy M. Hagle, "Opinion Writing and Acclimation Effect," *Political Behavior* 18 (1996): 235-261. For a view that rejects

Roberts Court has developed an initial three-Term record scholars can use in analyzing performance and anticipating likely developments in the near future."[150] My project, therefore, investigates Roberts' opinions from his first four Terms on the Court (the October 2005 Term through the October 2008 Term), and these Term periods allow me to investigate these claims as well as to investigate whether the new Chief Justice takes a policy-making or agenda-setting approach in how he leads the Court. Roberts' published opinions, then, also offer another chronologically archival source that can be compared against the pre-Court archival sources, which allows this project to answer two additional questions:

(4) Do Roberts' pre-Court argumentative and rhetorical strategies parallel the argumentative and rhetorical strategies he utilizes in his published appellate court and Supreme Court opinions?

(5) Do Roberts' published opinions reflect a discernable judicial temperament and constitutional philosophy?

Chief Justice Roberts: A New Conservative Court

Upon Chief Justice Roberts' arrival to the Court, two scholars concluded that "Roberts is unlikely to shift the direction of the Court."[151] These scholars' claim assumes that once seated on the Court, a Justice will adhere to the ideological label

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"the freshmen effect hypothesis," see Melone, "Judicial Discretion and the Senate's Role in Judicial Selection," 564-565.

[150] Christopher E. Smith, Michael A. McCall, and Madhavi M. McCall, "The Roberts Court and Criminal Justice at the Dawn of the 2008 Term," *Charleston Law Review* 3 (2009): 266.

[151] Neubauer and Meinhold, *Battle Supreme*, 40.

('conservative' or 'liberal') that has been ascribed to him or her, and that Justice's decisions will reflect the ideological "box" into which a Court follower or critic placed the Justice. Moreover, the presumption exists that a Justice will remain true to this ideological label throughout his or her tenure on the Court.[152]

Many scholarly endeavors, therefore, attempt to predict how a Justice, based on the ideology attributed to him or her, will resolve a case before the Court.[153] As Lee Epstein and his colleagues note, however, "predicting the future ideology of any given nominee may be a risky business"[154] and that "drawing inferences about their future behavior . . . is an enterprise doomed to failure."[155] According to these political scientists, Justices, during their first few years of service on the Court, may initially resolve cases consistent with the ideological label ascribed to them. During their tenure

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[152] See Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, "Ideological Drift among Supreme Court Justices: Who, When, and How Much?" *Northwestern University Law Review* 101 (2007): 1487.

[153] One ongoing prediction effort, for example, involves the Supreme Court Forecasting Project. For scholarship discussing the Project, see Lee Epstein, "Introduction to the Symposium," *Perspectives on Politics* 2 (2004): 757-759; Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger, and Pauline T. Kim, "Competing Approaches to Predicting Supreme Court Decision Making," *Perspectives on Politics* 2 (2004): 761-767; Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, and Kevin M. Quinn, "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking," *Columbia Law Review* 104 (2004): 1150-1210; and Susan S. Silbey, "The Dream of Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere," *Perspectives on Politics* 2 (2004): 785-790. For a criticism of the Project, see Gregory A. Caldeira, "Expert Judgment versus Statistical Models: Explanation versus Prediction," *Perspectives on Politics* 2 (2004): 777-780. On forecasting models in general, see Kevin D. Ashley and Stefanie Brüninghaus, "Computer Models for Legal Prediction," *Jurimetrics* 46 (2006): 309-352.

[154] Lee Epstein, Andrew D. Martin, Kevin M. Quinn, and Jeffrey A. Segal, "Ideological Drift among Supreme Court Justices: Who, When, and How Much?" *Northwestern University Law Review* 101 (2007): 1521.

[155] Epstein, Quinn, Martin, and Segal, "On the Perils of Drawing Inferences," 179.

on the Court, though, most Justices experience an "ideological drift" in which they move either to the left or to the right (or switch directions several times) "before hitting the first-decade mark" of their time on the Court.[156] Epstein and his colleagues conclude that "[d]rift to the right or, more often, to the left is the rule, not the exception."[157]

My project, therefore, aims to provide answers to the aforementioned questions, and offers insight into whether Chief Justice Roberts has begun his ideological drift away from the conservative ship that many hoped would power the Court for years to come. In order to address with these questions and to adequately conduct a study from an interdisciplinary perspective, the next chapter discusses the major concepts required for understanding and examining the relevant artifacts for conducting a chronologically archival study: rhetoric, argument, and judicial philosophies.

[156] Epstein, Martin, Quinn, and Segal, "Ideological Drift among Supreme Court Justices," 1486.

[157] Epstein, Martin, Quinn, and Segal, "Ideological Drift among Supreme Court Justices," 1540.

CHAPTER II

MAKING SENSE OF THE LAW:

RHETORIC, ARGUMENTS, AND JUDICIAL PHILOSOPHIES

Legal experts engage in fervent academic debates over the manner in which Supreme Court Justices decide the cases that appear before them, and the judicial philosophy to which the Justices adhere and utilize to resolve cases. To adequately address these topics—or any others that attempt to discern or question the Justices' legal reasoning—requires a more in-depth understanding of the decision-making practices of the Court; both Court critics and followers must move beyond stamping a nominee or Justice as a conservative or liberal, a Republican or Democrat, or any other convenient label. The most current research, as discussed in the first chapter, reveals that Justices often experience "ideological drift," and as stealth candidate David Souter and many of his decisions demonstrate, neither the political ideology of the nominee nor the party affiliation of the appointing president offer valid assumptions about the nominee's long-term decision-making once he or she takes a seat on the Court.[158] To better capture the dynamic nature of the decision-making process, therefore, necessitates a discussion on three key concepts that comprise the legal reasoning process in which the Justices engage: rhetoric, arguments, and judicial philosophies. This chapter, therefore, provides

[158] As Professor of Law Jack Balkin explains, "Ideological drift occurs because political, moral, and legal ideas are and can only be made public through signs that must be capable of iteration and reiteration in a diverse set of new moral, legal, and political contexts." Jack M. Balkin, "The Promise of Legal Semiotics," *Texas Law Review* 69 (1991): 1833.

the requisite background for understanding the legal reasoning process, and hence the writing process, as well as advocates an approach for examining the Court's output that makes deciphering the judicial opinion accessible both to scholars and laypersons.

The Supreme Court and Rhetoric: Pejorative or Constructive?

Similar to politicians who utilize their position or office as a platform for promoting their ideas, or what scholars refer to as using the "bully pulpit," Christopher Eisgruber suggests that "judicial opinions give judges a bully pulpit from which to propound their ideas."[159] For it is through the published majority (five or more Justices) or plurality (a majority of the majority) opinion of the Court that a decision becomes the proverbial "Law of the Land." That is, the pronouncement contained within a majority or plurality opinion provides the rationale for what is and is not 'legal' or 'constitutional.' In making its pronouncement, the Court serves the role of which Alexander Hamilton wrote in *The Federalist #78*, in which he argued that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution."[160] Hamilton based his contention on the prospect of a three-branch system for the new Republic's government. As the judicial branch, the Supreme Court would neither head the country nor the states; that aspect of governing would be left to the executive branches of the federal, state, and local governments. As the judicial branch,

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[159] Eisgruber, "Is the Supreme Court and Educative Institution?" 1004. As John Conley and William O'Barr note, "judicial opinions" are the "official discourse of the law." John M. Conley and William M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990), 2.

[160] Alexander Hamilton, "Federalist No. 78: The Judiciary Department," in *The Federalist Papers,* ed. Clinton Rossiter, 463-471 (New York: Signet Classic/Penguin, 2003), 464.

the Supreme Court would not establish laws nor enact policies; that task would be reserved for the legislative branches of the federal, state, and local governments. Instead, as the highest appellate court in America, the Supreme Court would serve as the final arbiter in deciding whether an executive or legislative branch, or an institution, or an individual had acted within or beyond the parameters of the 'legal' or the 'constitutional.' In making such a determination, the Supreme Could would uphold the Hamiltonian idea that an independent judiciary would provide "an essential safeguard against the effects of occasional ill humors in the society."[161]

The Court often explains its decision of the 'legal' or 'constitutional' through a written, or what is termed a 'published,' opinion.[162] In an ideal world, the judicial opinion will "provide a compelling story in a pragmatic fashion, in a form that laypersons can understand and accept."[163] In reality, however, for most citizens of the Land, deciphering and understanding a judicial opinion, and attempting to assess its applicability for their own lives, largely remains a futile process; instead, the sense-making associated with the judicial opinion is reserved primarily for those with specific training in the field of law and for those who understand and "engage in law-talk."[164]

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[161] Hamilton, "Federalist No. 78: The Judiciary Department," 469.

[162] For more on published and unpublished opinions, see K.K. DuVivier, "Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions," *Journal of Appellate Practice and Process* 3 (2001): 397-418.

[163] Marouf Hasian, Jr., "Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies toward Rhetorical Consciousness," *Legal Studies Forum* 17 (1994): 358.

[164] As Sanford Levinson explains, "law-talk . . . is a highly structured enterprise that includes references—to precedents, texts, legislative speeches, and the like—that are selected out for comment precisely

Third Circuit Court Judge Ruggero Aldisert suggests that "an opinion writer's sole purpose [is] to persuasively communicate an argument to the opinion readers,"[165] yet as Professor Roger Stahl notes, "Supreme Court decisions are awash in competing philosophies and language games."[166] Consequently, very few people, save those associated with the legal profession or the media, actually read a published opinion of the Court.[167]

Perhaps the sheer complexity of the judicial opinion and the opinion writer's discursive choices and strategies deter the average citizen from reading a judicial opinion. In fact, as Martin Mayer observes, "[t]here is some feeling among legal academics that the Court's opinions mimic law review articles, which is not necessarily good for the country."[168] A typical opinion discusses complex statutes and references prior Court decisions, often contains detailed footnotes, and includes a variety of argument types, historical allusions, literary devices, and persuasive techniques; or, as Professor Frederick Schauer explains, judicial opinions "draw scorn" due to their

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because of some theory that makes them relevant." Sanford Levinson, "The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)," *University of Colorado Law Review* 63 (1992): 395.

[165] Ruggero J. Aldisert, Meehan Rasch, and Matthew P. Bartlett, "Opinion Writing and Opinion Readers," *Cardozo Law Review* 31 (2009): 42.

[166] Roger Stahl, "Carving Up Free Exercise: Dissociation and 'Religion' in Supreme Court Jurisprudence," *Rhetoric & Public Affairs* 5 (2002): 444.

[167] For support for this contention, see Frederick Schauer, "Opinions as Rules," *University of Chicago Law Review* 62 (1995): 1455-1475.

[168] Mayer, *The Judges*, 307.

"complexity, inaccessibility to nonspecialists, and dullness."[169] As a result, examining a judicial opinion, or the official 'text' of the Court,[170] involves recognizing that the diversity of discursive choices a Justice utilizes to convey his or her method of legal reasoning to gain "the adherence of minds" of the audience[171] for the decision firmly situates the judicial opinion, which Professor Jim Aune argues "[is] a distinctive form of rhetoric,"[172] within the fields of both law and rhetoric, hence James Boyd White's claim that "law is most usefully seen . . . as a branch of rhetoric."[173] While other scholars agree that law is a rhetorical activity,[174] those interested in studying the Court and its opinions

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[169] As Schauer explains, many critics contend that "the modern judicial opinion, especially the modern Supreme Court constitutional opinion, is excessively divided into sections and subsections, relies too heavily on three-part tests, is overly footnoted, cannot be understood by nonspecialists, is uninteresting to read even for specialists, and is devoid of anything even remotely resembling literary style." Schauer, "Opinions as Rules," 1462, 1455.

[170] As James Boyd White notes, "judicial opinions . . . are central texts in our law." James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990), xv.

[171] See Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Indiana: University of Notre Dame Press, 1969), 14.

[172] James A. Aune, "Modernity as a Rhetorical Problem: *Phronēsis*, Forms, and Forums in *Norms of Rhetorical Culture*," *Philosophy and Rhetoric* 41 (2008): 414.

[173] James Boyd White, "The Arts of Cultural and Communal Life," in *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs*, ed. John S. Nelson, Allan Megill, and Donald N. McCloskey, 298-318 (Madison.: University of Wisconsin Press, 1987), 298.

[174] According to Dale Hample, "In nearly every respect, law is rhetorical;" Leigh Hunt Greenhaw describes "law as a rhetorical activity," which involves "the ongoing, persuasive use of legal language to resolve problem situations;" and, according to Ian Fielding, "one would be hard pressed to conceptualize law as something other than rhetorical." See Hample, "Motives in Law," 156; Greenhaw, "'To Say What the Law Is,'" 866; and, Ian Fielding, "Rhetorical Context and the Judicial Opinion: A Case Study of *Ben-Shalom* v. *Marsh*," *Legal Studies Forum* 17 (1994): 419. Kurt Saunders suggests that "law is a rhetorical activity because legal reasoning is a form of practical argumentation." Kurt M. Saunders, "Law as Rhetoric, Rhetoric as Argument," *Journal of Legal Education* 44 (1994): 568.

'as a branch of rhetoric' or from a rhetorical perspective face two challenges: defining "rhetoric" and justifying "rhetorical criticism" as a valid methodology for studying legal texts, especially judicial opinions.

The first challenge, which legal scholar Eileen Scallen identifies as "[t]he most fundamental problem," involves attempting to define the term 'rhetoric.'[175] Legal scholars, for example, offer starkly contrasting meanings for the term. Stanley Fish suggests that "rhetoric is by definition the forceful presentation of an interested argument—rhetoric is another word for force,"[176] while Marc Gold simply defines rhetoric "as the use of argument to persuade."[177] Robert Prentice, though, offers a more Classical meaning and he defines rhetoric "as it was used by Aristotle, to denote persuasive strategies in discourse."[178] Scholars within academe, such as the communication field, provide an equally diverse range of meanings for the term. As

[175] Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," 68.

[176] Stanley E. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989), 517.

[177] Marc E. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada," *Supreme Court Law Review* 7 (1985): 457. According to Gold, "Every judicial opinion is an example of rhetoric. The court must persuade its audiences that the decision was reached in an acceptable way and that the result was justified." Similar to Gold, Pratt defines "judicial rhetoric" as "all that is involved in the process of argumentation and debate." Walter F. Pratt, "Rhetorical Styles on the Fuller Court," *American Journal of Legal History* 24 (1980): 191. Other scholars also work from similar perspectives. According to Bruce McLeod, "From a rhetorical standpoint, law can be described as an exercise of argumentation" because "[r]hetoric reinserts the judge into the realm of argumentation. It asks the nature of legal rules be explained with their reference to their use in judicial decisions, and not *vice versa*." See McLeod, "Rules and Rhetoric," 311, 320.

[178] Prentice, "Supreme Court Rhetoric," 86. One of the leading law school texts, for example, notes that "[l]egal rhetoric is a mix of logic, emotion, exhortation, and social policy that is designed to persuade the reader or hearer that one position is better than another." David T. Ritchie, *Mastering Legal Analysis and Communication* (Durham, N.C.: Carolina Academic Press, 2008), 75.

David Smit notes, "the ways we define rhetoric are complex and open to interpretation,"[179] and he argues that "formally defining rhetoric seems to have been restricted to theorists and critics, and in the last forty years academic definitions have increasingly broadened the term."[180] As a result, Smit explains, "rhetoric" now encompasses "some aspect of discourse, such as informative or persuasive speaking; all of verbal discourse, both spoken and written; or all of human meaning-making, whether verbal or not . . . "[181]

As a result of these disparate definitions, interdisciplinary approaches struggle to situate legal discourse within the 'branch of rhetoric.' When scholars limit "rhetoric" only to the linguistic choices made for suasory effects, they view "rhetoric" as a disparaging practice, a practice which "to modern ears" is "oratorical emptiness."[182] Consequently, as Peter Goodrich explains, "[t]he most common modern acceptations of the term [rhetoric] are pejorative. . . . Ordinary usage now defines rhetoric as the specious, bombastic, or deceitful use of language; rhetoric, in other words, is the abuse of language."[183] Perhaps as a result of this view, or as a response to this view, "[o]pening

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[179] David W. Smit, "The Uses of Defining Rhetoric," *Rhetoric Society Quarterly* 27 (1997): 49.

[180] Smit, "The Uses of Defining Rhetoric," 41.

[181] Smit, "The Uses of Defining Rhetoric," 42.

[182] C. Hugh Holman and William Harmon, *A Handbook to Literature*, 5th ed. (New York: Macmillan Publishing Company, 1986), 428.

[183] Goodrich, "Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language," 88.

up legal discourse to insights from other disciplines . . . inevitably upsets lawyers' claim to specialized knowledge and expertise."[184]

The second challenge facing those interested in studying the Court and its opinions, according to Scallen, involves "explaining the utility of rhetorical criticism of legal texts."[185] Like the term rhetoric, rhetorical criticism also has a variety of meanings.[186] For some scholars, rhetorical criticism "impose[s] on the reader the author's view of the meaning, both denotative and connotative, of the work."[187] A more objective stance on rhetorical criticism, however, regards the practice as the "[a]nalysis, explanation, and interpretation" of a text.[188] In utilizing this critical approach for legal texts, however, scholars must overcome two assumptions held by those in the legal community: first, that "legal rhetoric only consists of the arguments made to a judge or jury" and the corresponding linguistic ornamentation contained within a judicial opinion, and second, "justifying the use of 'criticism,'" which for many in the legal community simply means "criticizing a legal text [by] pointing out what is wrong with it, ignoring the possibility that criticism can also celebrate what is right about a text."[189] Law

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[184] Dagan, "The Realist Conception of Law," 632.

[185] Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," 68.

[186] For a collection of essays that trace the history and changes within rhetorical criticism, see Carl R. Burgchardt, *Readings in Rhetorical Criticism*, 2nd ed. (State College, PA.: Strata Publishing, Inc., 2000).

[187] Holman and Harmon, *A Handbook to Literature*, 429.

[188] Stephen E. Lucas, "The Schism in Rhetorical Scholarship," in *Readings in Rhetorical Criticism*, 2nd ed., ed. Carl R. Burgchardt, 88-107 (State College, PA.: Strata Publishing, Inc., 2000), 102.

[189] Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," 68-69.

Professor Jack Balkin considers "the process of analyzing a discourse in terms of recurring tropes or moves 'rhetorization,'" and he suggests that "to 'rhetorize' a discourse is to see its arguments as moves as repeatable rhetorical forms."[190]

Given these two challenges—defining rhetoric and justifying rhetorical criticism—one might ask: why do these dilemmas matter, and why are they relevant to the study of law and judicial opinions? While neither question presents an easy answer, several compelling reasons exist for answering them.

The simplest justification for resolving the dilemmas involves the recognition that "rhetoric unites the theory and practice of law."[191] The opinion of the Court is "[t]he quintessential legal message" that must "utilize rhetorical strategies to be truly effective."[192] Discerning how rhetoric operates within an opinion is vital for understanding not only the content of the opinion, but also for recognizing the argumentative strategies a Justice utilized to determine the legality or constitutionality of the issue before the Court, for understanding the "techniques and devices and forms of argument" contained within an opinion subsequently allows one to understand "the

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[190] Balkin, "The Promise of Legal Semiotics," 1843.

[191] Levine and Saunders, "Thinking Like a Rhetor," 108.

[192] Prentice, "Supreme Court Rhetoric," 122. Neil MacCormick notes that there is a "rhetorical character of legal argumentation. Wherever there is a process of public argumentation, there is rhetoric." MacCormick, though, believes that the study of the law revived the study of rhetoric as an interdisciplinary approach for studying the law: "The modern rediscovery of rhetoric as a legally significant discipline owes much to reflection on legal reasoning." Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (New York: Oxford University Press, 2005), 17.

rhetoric of legal reasoning."[193] At the same time, understanding the use of rhetoric allows one to analyze effectively how the author of the opinion evaluated the prior history, tradition, and jurisprudence of the Court, and whether any of those influenced the resolution of the case before the Court, or whether a Justice utilized a different approach for resolving the case. In other words, one must first understand rhetoric before one can attempt to discern the judicial philosophy or temperament of a Justice since the Justices' "ideologies [are] revealed in their language and discourse,"[194] and as appellate court Judge Patricia Wald notes, a judge's "rhetoric will generally follow that of the analytical mode chosen" to decide a case.[195]

To better capture the legal reasoning and decision-making process of a Supreme Court Justice, as well as to alleviate the pejorative connotations associated with the term 'rhetoric,' this project offers a more succinct definition that guides the subsequent analysis regarding Chief Justice Roberts and his writings: *Legal rhetoric is the use of argumentative strategies within a text to advance a position and to ground the rationale and reasoning for that position*. This definition provides a foundation for an interdisciplinary study of those texts in which a writer must advocate and justify a position on a particular issue, as well as recognizes that the reasoning process involves

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[193] Donald H. J. Hermann, "Legal Reasoning as Argumentation," *Northern Kentucky Law Review* 12 (1985): 510.

[194] Brisbin, Jr., "Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State," 1006. At the same time, Brisbin argues that Justices' "language and related discourse using it conveys information about the specific political views and relationships among the justices" (p. 1030).

[195] Wald, "The Rhetoric of Results and the Results of Rhetoric," 1405.

the deliberate and purposeful selection of arguments and linguistic devices to advance and justify a position. At the same time, the definition forces the critic of a text to focus attention on the crucial portions of that text central to the writer's primary objective: justifying the outcome of the decision. This definition also serves an important function for the study of the law and the opinions of the Supreme Court—the definition allows scholars to justify the use of rhetorical criticism as a methodological approach for examining legal texts.

Rhetorical Criticism and the 'Law and Rhetoric' Movement

While the public hesitates to study the law or judicial opinions, scholars within academe approach their studies from a variety of critical approaches. Many of these studies fall within a "Law and" category, such as the "Law and Literature" movement, which examines judicial opinions as narratives or as examples of storytelling,[196] or for

[196] On examining legal texts from a narrative approach, see, for example, Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge, MA: Harvard University Press, 2000), 110-142; Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton, N.J.: Princeton University Press, 2000), 201-291; Geoffrey Klinger, "Rhetoric's Wide-Angle Lenses: How Legal Vision Can Be Enhanced with Rhetorical Glasses," in *Argument in Controversy: Proceedings of the Seventh Summer Conference on Argumentation*, ed. Don Parson, 359-363 (Annandale, VA: Speech Communication Association, 1983); Mary Ellen Maatman, "Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law," *University of Pittsburgh Law Review* 60 (1998): 1-88; Gwen C. Mathewson, "'Outdoing Lewis Carroll': Judicial Rhetoric and Acceptable Fictions," *Argumentation* 12 (1998): 233-244; Elizabeth Mertz, "Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices," *Anthropological Linguistics* 30 (1988): 369-394; William M. O'Barr and John M. Conley, "Ideological Dissonance in the American Legal System," in *Disorderly Discourse: Narrative, Conflict, and Inequality*, ed. Charles L. Briggs, 114-134 (New York: Oxford University Press, 1996); David R. Papke and Kathleen H. McManus, "Narrative and the Appellate Opinion," *Legal Studies Forum* 23 (1999): 449-465; Dennis M. Patterson, "The Importance of Asking the Right Questions," *Social Epistemology* 5 (1991): 75-77; Dennis M. Patterson, "Toward a Narrative Conception of Legal Discourse," *Social Epistemology* 5 (1991): 61-69; William Twining, "Narrative and Generalizations in Argumentation about Questions of Fact," *South Texas Law Review* 40 (1999): 351-365; Robin West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory," *New York University Law Review* 60 (1985): 145-211; and, James Boyd White, "Imagining the Law," in *The*

their use of literary devices.[197] While this approach provides interesting insight into the judicial texts, many legal scholars remain critical of examining judicial opinions from the "Law and Literature" perspective.[198]

Rhetoric of Law, ed. Austin Sarat and Thomas R. Kearns, 29-55 (Ann Arbor: University of Michigan Press, 1994). On criticism of the narrative approach, see Steve Fuller, "Why Narrative is Not Enough," *Social Epistemology* 5 (1991): 70-74, and William Lewis, "Law's Tragedy," *Rhetoric Society Quarterly* 21 (1991): 11-21. For approaching the law from a storytelling perspective, see W. Lance Bennett, "Storytelling in Criminal Trials: A Model of Social Judgment," *Quarterly Journal of Speech* 64 (1978): 1-22; W. Lance Bennett, "Rhetorical Transformation of Evidence in Criminal Trials: Creating Grounds for Legal Judgment," *Quarterly Journal of Speech* 65 (1979): 311-323; and, A. Cheree Carlson, "The Role of Character in Public Moral Argument: Henry Ward Beecher and the Brooklyn Scandal," *Quarterly Journal of Speech* 77 (1991): 38-52.

[197] For scholarship within the "Law and Literature" tradition, see Benjamin N. Cardozo, "Law and Literature," *Yale Law Journal* 48 (1939), 489-507; Benjamin N. Cardozo, *Law and Literature and Other Essays and Addresses* (New York: Harcourt, Brace and Company, 1931), 3-40; Ronald Dworkin, "Law as Interpretation," *Texas Law Review* 60 (1982): 527-550; Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law and the Humanities* 2 (1990): 201-219; Marouf Hasian, Jr., "In Search of 'Ivan the Terrible': John Demjanjuk and the Judicial Use of Ironic Argumentation," *Argumentation and Advocacy* 39 (2003): 231-253; Adalberto Jordan, "Imagery, Humor, and the Judicial Opinion," *University of Miami Law Review* 41 (1987): 693-727; John Leubsdorf, "The Structure of Judicial Opinions," *Minnesota Law Review* 86 (2001): 447-496; Pierre N. Leval, "Judicial Opinions as Literature," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz, 206-210 (New Haven, CT: Yale University Press, 1996); Sanford Levinson, "Law as Literature," *Texas Law Review* 60 (1982): 373-403; Anthony Musante, "Black and White: What Law and Literature Can Tell Us About the Disparate Opinions in *Griswold* v. *Connecticut*," *Oregon Law Review* 85 (2006): 853-894; Martha C. Nussbaum, "Poets as Judges: Judicial Rhetoric and the Literary Imagination," *University of Chicago Law Review* (62) 1995: 1477-1519; Michael Pantazakos, "Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement," *Cardozo Studies in Law and Literature* 7 (1995): 31-71; Posner, *Law and Literature*; Posner, *Cardozo: A Study in Reputation*; Posner, *Overcoming Law*, 471-497; Scallen, "American Legal Argumentation," 705-717; Richard Weisberg, "How Judges Speak: Some Lessons on Adjudication in *Billy Budd, Sailor* with an Application to Justice Rehnquist," *New York University Law Review* 57 (1982): 1-69; James Boyd White, "Law as Language: Reading Law and Reading Literature," *Texas Law Review* 60 (1982): 415-445; and, William E. Wiethoff, "Preaching the Constitution," *Hastings Constitutional Law Quarterly* 23 (1996): 627-636. For an approach that examines the law through the interrelationships of precedent, history, remembrance, and collective memory see Marouf Hasian, Jr., "The Advent of Critical Memory Studies and the Future of Legal Argumentation," *Argumentation and Advocacy* 38 (2001): 41-45, and Todd F. McDorman, "History, Collective Memory, and the Supreme Court: Debating 'the People' through the *Dred Scot* Controversy," *Southern Communication Journal* 71 (2006): 213-234. On the use of epigrams, see Domnarski, "The Tale of the Text," 459-466. On judges' use of metaphor in written opinions, see Haig A. Bosmajian, *Metaphor*

A second critical approach within the "Law and" category is the "Law and Rhetoric" movement, an interdisciplinary movement to which both legal and communication scholars belong. My project aims to contribute to this growing movement and dialogue by demonstrating that an interdisciplinary approach that comprehensively analyzes legal and judicial texts within the purview of a more succinct definition of 'rhetoric' avoids many of the criticisms attributed to the "Law and" movements.[199] In fact, both legal and communication scholars are using the rhetorical approach to study legal argumentation,[200] and as communication scholars John Louis

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and Reason in Judicial Opinions (Carbondale: Southern Illinois University Press, 1992), and Robert L. Tsai, "Fire, Metaphor, and Constitutional Myth-Making," *Georgetown Law Journal* 93 (2004): 181-239.

[198] See Jane B. Baron, "Law, Literature, and the Problems of Interdisciplinarity," *Yale Law Journal* 108 (1999): 1059-1085. Specifically, Baron criticizes the "law and" scholars, and she primarily focuses her attention on the law-and-literature scholarship. Richard Posner, an avowed "'intentionalist' (with qualifications)," comments: "The proposition that literary critics can point the way to solving the puzzles of statutory and constitutional interpretation is the falsest of the false hopes of the law and literature movement." See Posner, *Law and Literature*, 17. Also see Robin L. West, "Adjudication is Not Interpretation: Some Reservations about the Law-as-Literature Movement," *Tennessee Law Review* 54 (1986): 203-278 and Robin L. West, "Communities, Texts, and Law: Reflections on the Law and Literature Movement," *Yale Journal of Law and the Humanities* 1 (1988): 129-156.

[199] See James Arnt Aune, "On the Rhetorical Criticism of Judge Posner," *Hastings Constitutional Law Quarterly* 23 (1996): 658-669 and Warren E. Wright, "Judicial Rhetoric: A Field for Research," *Speech Monographs* 31 (1964): 64-72. For additional assistance in understanding Aune's critique, see Posner, *Overcoming Law*, 498-530. Several scholars, in fact, suggest that the communication field provides tangible benefits to students interested in studying the law or in attending law school, especially when an emphasis in class includes the study of communication, judicial argumentation, and court opinions. See, for example, Elizabeth Fajans and Mary R. Falk, "Against the Tyranny of Paraphrase: Talking Back to Texts," *Cornell Law Review* 78 (1993): 163-205; Ronald J. Matlon, "Bridging the Gap between Communication Education and Legal Education," *Communication Education* 31 (1982): 39-53; Glen E. Mills, "Legal Argumentation: Research and Teaching," *Western Speech Communication* 40 (1976): 83-90; and, Richard D. Rieke, "The Role of Legal Communication Studies in Contemporary Departments of Communication," *Association for Communication Administration Bulletin* 24 (1978): 31-33.

[200] For articles from communication scholars applying a rhetorical approach to studying the law, see J. Louis Campbell, III, "How Opinions Can Persuade: A Case Study of William O. Douglas," *Federal Bar*

and News Journal 29 (1982): 231-234; Vivian I. Dicks, "Courtroom Rhetorical Strategies: Forensic and Deliberative Perspectives," *Quarterly Journal of Speech* 67 (1981): 178-192; James M. Golden and Josina M. Makau, "Perspectives on Judicial Reasoning," in *Explorations in Rhetoric: Studies in Honor of Douglas Ehninger*, ed. R. E. McKerrow, 152-177 (Glenview, IL: Scott, Forsemann & Company, 1982); Michael R. Hagan, "*Roe* v. *Wade*: The Rhetoric of Fetal Life," *Central States Speech Journal* 27 (1976): 192-199; Hasian, Jr., "Myth and Ideology in Legal Discourse," 347-365; Marouf Hasian, Jr., "Legal Argumentation in the Godwin-Malthus Debates," *Argumentation and Advocacy* 37 (2001): 184-197; Marouf Hasian, Jr., "Vernacular Legal Discourse: Revisiting the Public Acceptance of the 'Right to Privacy' in the 1960s," *Political Communication* 18 (2001): 89-105; Marouf Hasian, Jr., Celeste Michelle Condit, and John Louis Lucaites, "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal' Doctrine," *Quarterly Journal of Speech* 82 (1996): 323-342; John Louis Lucaites, "Between Rhetoric and 'The Law': Power, Legitimacy, and Social Change [book review]," *Quarterly Journal of Speech* 76 (1990): 435-449; Josina M. Makau, "The Supreme Court and Reasonableness," *Quarterly Journal of Speech* 70 (1984): 379-396; Makau and Lawrence, "Administrative Judicial Rhetoric," 191-205; Theodore O. Prosise and Craig R. Smith, "The Supreme Court's Ruling in *Bush* v. *Gore*: A Rhetoric of Inconsistency," *Rhetoric & Public Affairs* 4 (2001): 605-632; Richard D. Rieke, "Argumentation in the Legal Process," in *Advances in Argumentation Theory and Practice*, ed. J. Robert Cox and Charles Arthur Willard, 363-376 (Carbondale: Southern Illinois University Press, 1982); Richard D. Rieke, "The Judicial Dialogue," *Argumentation* 5 (1991): 39-55; J. Clarke Rountree, III, "On the Rhetorical Analysis of Judicial Discourse and More: A Response to Lewis," *Southern Communication Journal* 61 (1995): 166-173; J. Clarke Rountree, III, "Instantiating 'The Law' and Its Dissents in *Korematsu* v. *United States*: A Dramatistic Analysis of Judicial Discourse," *Quarterly Journal of Speech* 87 (2001): 1-24; Warren Sandmann, "The Argumentative Creation of Individual Liberty," *Hastings Constitutional Law Quarterly* 23 (1996): 637-657; Saunders, "Law as Rhetoric, Rhetoric as Argument," 566-578; Edward Schiappa, "Analyzing Argumentative Discourse from a Rhetorical Perspective: Defining 'Person' and 'Human Life' in Constitutional Disputes over Abortion," *Argumentation* 14 (2000): 315-332; Stahl, "Carving Up Free Exercise," 439-481; and Paul Stob, "*Chisholm* v. *Georgia* and the Question of the Judiciary in the Early Republic," *Argumentation and Advocacy* 42 (2006): 127-142. For articles and books from argumentation scholars applying a rhetorical approach to studying the law, see Eveline T. Feteris, "A Survey of 25 Years of Research on Legal Argumentation," *Argumentation* 11 (1997): 359-362; Hanns Hohmann, "Logic and Rhetoric in Legal Argumentation: Some Medieval Perspectives," *Argumentation* 12 (1998): 39-55; Janice Schuetz, *Communicating the Law: Lessons from Landmark Legal Cases* (Long Grove, IL: Waveland Press, Inc., 2007); and, Frans H. Van Eemeren and Peter Houtlosser, "Rhetorical Analysis within a Pragma-Dialectical Framework: The Case of R. J. Reynolds," *Argumentation* 14 (2000): 293-305. Other scholars (including lawyers and legal academics) writing from a diversity of academic fields and contributing to the rhetorical turn toward studying the law include David E. Anderson, "Reflections on the Supreme Court, Constitutionalism, and the Rhetoric of Law," *Saint Louis University Public Law Review* 8 (1989): 75-86; Binder and Weisberg, *Literary Criticisms of Law*, Chapter 3, "Rhetorical Criticism of Law," 292-377; Lawrence Douglas, "Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review," in *The Rhetoric of Law*, ed. Austin Sarat and Thomas R. Kearns, 225-260 (Ann Arbor: University of Michigan Press, 1994); Fielding, "Rhetorical Context and the Judicial Opinion," 419-435; Jerry Frug, "Argument as Character," *Stanford Law Review* 40 (1988): 869-927; Peter Goodrich, "Antirrhesis: Polemical Structures of Common Law Thought," in *The Rhetoric of Law*, ed. Austin Sarat and Thomas R. Kearns, 57-102 (Ann Arbor: University of Michigan Press, 1994); L. H.

Lucaites and William Wiethoff stress, "the potential for significant dialogue between rhetoricians and legal theorists and critics is considerable."[201]

Conducting an exhaustive analysis of a variety of legal texts, such as appellate court and Supreme Court opinions, holds promise for advancing this interdisciplinary dialogue. As Scallen notes, "[r]hetorical criticism is the means to a more complete understanding of legal discourse,"[202] and White suggests that a "[r]hetorical analysis . . . may also provide a set of questions and attitudes that will enable us to move from one academic and social field to another and in doing so to unite them."[203] At the same time, as Gold explains, since rhetorical criticism "is paradigmatically interdisciplinary in thrust," such an approach "can illuminate the way in which a court both decides a case and wants to be seen as deciding that case."[204] In fact, Gold argues that "rhetorical

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LaRue, "The Rhetoric of Powell's *Bakke*," *Washington & Lee Law Review* 38 (1981): 43-61; Margaret M. Michels, "Rhetoric and Legitimation: An Analysis of Supreme Court Reversals," *Law & Semiotics* 20 (1988): 229-240; Anand Rao, "Supreme Court Decisions as Rhetorical Hybrids," *Speaker and Gavel* 34 (1997): 11-25; and, Kristen K. Robbins, "Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning," *Vermont Law Review* 27 (2003): 483-563.

[201] John Louis Lucaites and William E. Wiethoff, "A Sampler for Legal Rhetoricians and Rhetorical Lawyers," *Legal Studies Forum* 17 (1994): 343.

[202] Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," 69. Michael J. Perry offers a similar rationale: "To interpret a legal text is to (try to) identify the norm the text represents. The aim of the interpretive inquiry is to translate or decode the text, to render the text intelligible by identifying the meaning of the text—by identifying, that is, the norm represented by the text." Michael J. Perry, *The Constitution in the Courts: Law or Politics?* (New York: Oxford University Press, 1994), 7-8.

[203] White, "The Arts of Cultural and Communal Life," 312-313.

[204] Gold, "The Mask of Objectivity," 463.

analysis should serve as a primary paradigm through which we organize our research into the nature of the judicial opinion."[205]

Analyzing judicial opinions within a paradigm of rhetorical analysis, according to Scallen, serves three important functions. First, rhetorical criticism is instructive, in the sense that it "identifies, analyzes, and evaluates legal discourse," which thereby offers a method for teaching how to construct more effective argumentative or persuasive discourse. Second, rhetorical criticism serves a reconstructive function, in which the aim of the "criticism is to alter the reader's experience of the legal text, to make us see things we have never seen before." A rhetorical analysis allows the critic to move beyond merely commenting on the words of the text and instead offer an insight into why the writer made certain discursive choices and how those choices serve the writer's purpose. Third, rhetorical criticism provides an evaluative function, in which the critic offers an assessment as to whether the piece of legal discourse is a "fitting" text by establishing standards for what makes the legal discourse "good, bad, ugly" or effective/ineffective rather than simply saying a piece of legal discourse is "useful" or

[205] Gold also contends that "[a] rhetorical perspective offers a challenging and fruitful approach to the study of law. It changes the way in which cases are read, revealing dimensions of adjudication previously obscure and unnoticed. Moreover, it alters the theoretical framework in which the judicial process is evaluated. No judge, lawyer, academic or student can afford to be indifferent to the role of rhetoric in the law." See Gold, "The Mask of Objectivity," 508, 510. Also see Goodrich, "Historical Aspects of Legal Interpretation," 331-354, and Michels, "Rhetoric and Legitimation," 229-240. Brisbin argues that rhetorical analysis is appropriate for the study of appellate opinions as well. As Brisbin explains, "Scholarship . . . could turn to studying how the languages and modes of discourse in appellate judicial practice so constrict the creative capacity of the judges that their opinions often end up reproducing the political and constitutional order." Brisbin, Jr., "Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State," 1030. For a counter view on the study of the use of rhetoric in law, see Ranney, "Sizing Up Legal 'Rhetoric:' Law from the Outside In," 141-152.

"good if it succeeds."[206] Rhetorical criticism, therefore, allows the critic to move beyond the pejorative associations and to provide insight into how the author of a legal text advocates a position through deliberate argumentative choices.

A rhetorical analysis of judicial opinions also addresses the questions and concerns regarding a Justice's judicial temperament and judicial philosophy. As legal scholar Brian Porto suggests, "We expect judges to resolve legal questions by means of legal reasoning."[207] Often, scholars evaluate a Justice's legal reasoning through the lens of a particular judicial philosophy, which scholars then use to draw inferences about the Justice's adherence to that judicial philosophy or political ideology, as well as to surmise how a Justice would resolve a particular case (and the legal or constitutional issues therein) based on the Justice's adherence to that philosophy or ideology. A rhetorical analysis offers an effective avenue for evaluating such claims. As Rogers Smith argues,

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[206] Scallen, "Judgment, Justification and Junctions in Rhetorical Criticism of Legal Texts," 69-71. Frug offers a similar perspective: "I suggest . . . that we look at legal argument as an example of rhetoric. A rhetorical analysis of legal argument involves examining its elements, such as facts, precedents, and principles, not in terms of how they support the argument's conclusion but in terms of how they form attitudes or induce actions in others." Frug, "Argument as Character," 872. Also see Fielding, "Rhetorical Context and the Judicial Opinion," 419-435. As White notes, "The established tradition of judicial criticism" too often treats Court opinions as texts in which readers "will automatically see what is to be admired in a judicial opinion, and what condemned, as soon as it is pointed out to them," even though not all readers have "a shared sense of what we admire and what we deplore." White, *Justice as Translation*, 94.

[207] Brian L. Porto, *May It Please the Court: Judicial Processes and Politics in America*, 2nd ed. (Boca Raton, FL: CRC Press, 2009): 3. Robert Post offers a more direct account: "Because judges must be able to justify their decisions, they must also be able to justify the means of interpretation that they employ to reach those decisions. . . . Judges must be able to explain why they have decided to interpret the Constitution through one set of inquiries rather than another . . . judges require and must be able to articulate a 'theory' of constitutional interpretation." Robert Post, "Theories of Constitutional Interpretation," *Representations* 30 (1990): 14-15. For an in-depth explanation of the legal reasoning process, see Jerzy Wroblewski, "Legal Language and Legal Interpretation," *Law and Philosophy* 4 (1985): 239-255.

"interpretive studies of judicial ideologies" can "illuminate the modes of reasoning and logical tensions associated with certain sets of beliefs," and "nuanced discursive interpretations" can "highlight contradictions in a judge's ideological beliefs," thereby providing insight into how a Justice's legal reasoning and judicial philosophies interrelate.[208]

Providing a more succinct definition of legal rhetoric—the use of argumentative strategies within a text to advance a position and to ground the rationale and reasoning for that position—and recognizing the value of rhetorical analysis offers a substantial reconciliation to the aforementioned challenges. At the same time, for those interested in studying the Supreme Court, judicial opinions, and other legal texts, those alterations offer a more fruitful approach for entering an interdisciplinary dialogue. The remaining sections of the chapter, therefore, discuss the elements of the revised definition, which provides the requisite background for conducting a rhetorical analysis of Chief Justice John Roberts' legal writings.

Argumentative Strategies in Judicial Discourse

As the judicial opinion explicates what is or is not 'legal' or 'constitutional,' an expectation exists that the opinion writer has provided a justification and a rationale for arriving at that determination.[209] Typically, one or more legal arguments provide that

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[208] "Symposium: The Supreme Court and the Attitudinal Model," *Law and Courts Newsletter* 4 (1994): 9.

[209] As White explains, "the judicial opinion . . . is the text in which a judge seeks to explain what questions a case presents, how she resolves them, and why she resolves the case as she does." White, *Justice as Translation*, 89.

justification and rationale for how a Justice arrived at a decision,[210] though in many opinions there remains "a question of what are good arguments, and how we can distinguish good from bad arguments in these issues of interpretation and practical decision-making."[211]

In their simplest form, legal arguments are "formal and stylized;"[212] in many opinions, however, they "are rhetorical acts."[213] Reading and analyzing a judicial

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[210] As two legal scholars explain, "The most noteworthy characteristic of Court decisions is that they are reasoned and that there is no mystery. The reasoning may not always be well founded, but it is overt and available to all to criticize or agree with." Michael Kleine and Clay Robinson, "The Dialogic Rhetoric of the Supreme Court: An Interdisciplinary Analysis," *Rhetoric Review* 27 (2008): 419. On the use of legal arguments for providing a justification and rationale for a decision, see William L. Benoit, "An Empirical Investigation of Argumentative Strategies Employed in Supreme Court Opinions," in *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation*, ed. George Ziegelmueller and Jack Rhodes, 179-195 (Annandale, VA: Speech Communication Association, 1981); J. Robert Cox, "Argument and the 'Definition of the Situation,'" *Central States Speech Journal* 32 (1981): 197-205; Lawrence M. Friedman, "Taking Law and Society Seriously," *Chicago-Kent Law Review* 74 (1999): 529-530; Josina M. Makau, "A Functional Analysis of Judicial Argumentation: Implications to Argumentation Theory," *Speaker and Gavel* 20 (1983): 29-42; Raymond S. Rodgers, "Generic Tendencies in Majority and Non-Majority Supreme Court Opinions: The Case of Justice Douglas," *Communication Quarterly* 30 (1982): 232-236; Arend Soeteman, "Formal Aspects of Legal Reasoning," *Argumentation* 9 (1995): 731-746; Lee E. Teitelbaum and Wayne McCormack, "A Simplified Introduction to Legal Argument," *Utah Law Review* 35 (2006): 35-52; William E. Wiethoff, "Critical Perspectives on Perelman's Philosophy of Legal Argument," *Journal of the American Forensic Association* 22 (1985): 88-95; and, Brian Winters, "Logic and Legitimacy: The Uses of Constitutional Argument," *Case Western Reserve Law Review* 48 (1998): 263-307.

[211] MacCormick, *Rhetoric and the Rule of Law*, 7. According to MacCormick, "Any study of legal reasoning is therefore an attempt to expiscate and explain the criteria as to what constitutes a good or bad, an acceptable or unacceptable type of argument in the law." MacCormick, *Rhetoric and the Rule of Law*, 12-13.

[212] Robert C. Rowland, "The Influence of Purpose on Fields of Argument," *Journal of the American Forensic Association* 18 (1982): 230.

[213] Hagan, "*Roe* v. *Wade*: The Rhetoric of Fetal Life," 199. As Makau notes, "the Court uses argumentation to persuade the composite audience that the Court's selected stability and change are appropriate responses to the relevant rhetorical situations." Makau, "The Supreme Court and

opinion, therefore, requires an understanding of the various legal arguments from which the opinion writer can select, as well as requires an understanding of how those arguments comprise both an argumentative strategy and a rhetorical strategy for justifying and rationalizing the decision outlined in the opinion. At the same time, as Francis Mootz argues, "the most pressing need in legal theory is to develop a sophisticated account of the dynamic conceptual structure of legal argumentation practiced by lawyers and judges and a corresponding account of the conceptual structure of argumentation practiced by legal theorists."[214] Mootz's contention follows a long tradition of attempts at making argumentation more easily understandable.

In the modern era, one of the most influential models of an argument's structure was the "data-warrant-claim model" developed by Stephen Toulmin, who based his model of an argument's structure on legal reasoning.[215] According to Toulmin, an argument consists of three primary elements: the grounds (or data), which are the facts or other relevant information on which the argument is based; the warrant, or the justification that links the data to the claim; and, the claim, or the conclusion of the argument. Toulmin also includes three secondary elements as well: the backing, or the

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Reasonableness," 382. Also see Van Eemeren and Houtlosser, "Rhetorical Analysis within a Pragma-Dialectical Framework," 293-305.

[214] Francis J. Mootz, III, "Rhetorical Knowledge in Legal Practice and Theory," *Southern California Interdisciplinary Law Journal* 6 (1998): 607. Also see Stephen M. Griffin, "Pluralism in Constitutional Interpretation," *Texas Law Review* 72 (1994): 1753-1769, and Henry Prakken, "AI and Law, Logic and Argumentation Schemes," Argumentation 19 (2005): 303-320. Prakken advocates applying argumentation schemes to legal reasoning.

[215] Stephen E. Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958).

authority that provides credibility to the warrant; the qualifier, or the degree of certainty regarding the claim; and, the rebuttal, or the conditions or exceptions under which the claim might fail, and which serves a pre-emption against those objections that might be offered against the claim. Toulmin's model provides an easily accessible tool for identifying arguments and evaluating their structure, and many argumentation and legal scholars utilize Toulmin's model when they discuss the nature of legal argumentation[216] since his "model works for legal argument because it is accurate, flexible, and effective."[217]

For other argumentation theorists, however, Toulmin's model places the proverbial "cart before the horse;" that is, his model offers a method for identifying the structure of argument, but it does not provide a satisfactory account for what qualifies *as* an argument. Professor Robert Rowland explains the challenges when attempting to study argument: "The problem facing argumentation theorists today can be explained quite simply: there is no agreement on the defining characteristics of argument form, the theory which should undergird the study of argument, the proper method of evaluating that study, or even the meaning of the term argument itself."[218] For example, Rowland offers what he deems a "relatively simple" definition for argument, which "is discourse in which people attempt to solve problems rationally by supporting their claims with

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[216] See, for example, Richard M. Gaskins, *Burdens of Proof in Modern Discourse* (New Haven, CT: Yale University Press, 1992); Sandmann, "The Argumentative Creation of Individual Liberty," 637-657; and, Saunders, "Law as Rhetoric, Rhetoric as Argument," 568.

[217] Saunders, "Law as Rhetoric, Rhetoric as Argument," 571.

[218] Robert C. Rowland, "On Defining Argumentation," *Philosophy and Rhetoric* 20 (1987): 141.

reason and evidence,"[219] while another communication scholar defines argument as simply "a conclusion and its rationale."[220] A definition of argument, it seems, remains as broad as does the definition of rhetoric. The problem, however, is that legal arguments are not "relatively simple." To address the shortcomings of Toulmin's model, as well as to account for the complexity of legal arguments, legal scholars categorize arguments within argument schemes.[221]

Argument Schemes

As one argumentation scholar notes, "One of the most important descriptive aims of argumentation theory is the development of a typology of argument schemes."[222] Developing a basic argument scheme for legal arguments involves locating an argument within a text, identifying it as a 'type' of argument, and then placing that argument 'type' within a critic-created 'category.' One of the first post-Toulmin works on

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[219] Rowland, "On Defining Argumentation," 141.

[220] Benoit, "An Empirical Investigation of Argumentative Strategies Employed in Supreme Court Opinions," 181.

[221] As two legal scholars explain, "Modeling arguments with argumentation schemes has proven useful in attempts to refine the analyst's understanding of not only the logical structures that shape the backbone of the argument itself, but also the logical underpinning of strategies for evaluating it, strategies based on the semantic categories of genus and relevance." Fabrizio Macagno and Douglas Walton, "Argument from Analogy in Law, the Classical Tradition, and Recent Theories," *Philosophy and Rhetoric* 42 (2009): 154.

[222] Manfred Kienpointner, "Towards a Typology of Argument Schemes," in *Argumentation: Across the Lines of Discipline, Proceedings of the Conference on Argumentation 1976*, ed. Frans H. Van Eemeren, Rob G. Grootnedorst, J. Anthony Blair, and Charles A. Willard, 275-287 (Providence, R.I.: Foris Publications, 1986), 275. According to Douglas Walton and his colleagues, "Argumentation schemes are forms of argument (structures of inference) that represent structures of common types of arguments used in everyday discourse, as well as in special contexts like those of legal argumentation and scientific argumentation." Douglas Walton, Chris Reed, and Fabrizio Macagno, *Argumentation Schemes* (New York: Cambridge University Press, 2008), 1.

argumentation schemes, and one that effectively situated law within the branch of rhetoric, was Chaim Perelman and Lucie Olbrechts-Tyteca's *The New Rhetoric*, which aimed "to characterize the different argumentative structures."[223] Initially published in French and translated into English a decade later, *The New Rhetoric* provided a comprehensive account for how speakers and writers utilize argumentation, and the myriad types of argument, in their spoken and written discourse. Communication scholars welcomed Perelman and Olbrechts-Tyteca's work into their discipline, and *The New Rhetoric* offered these scholars a new tool for conducting argument-based critical analyses, especially in their approaches to studying legal rhetoric. As critical scholarship of legal rhetoric using Perelman and Olbrechts-Tyteca's work grew, scholars within the discipline, such as William Benoit[224] and Stephen Jones,[225] expanded upon and extended Perelman and Olbrecht-Tyteca's work and each developed new argument schemes. Additional communication scholars have developed similar schemes for categorizing the

[223] Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 9.

[224] Benoit's argument scheme includes argument by descriptive example, argument by causal example, analogy, argument from descriptive generalization, and argument from causal generalization. See Benoit, "An Empirical Investigation of Argumentative Strategies Employed in Supreme Court Opinions," 182-185.

[225] Jones developed "justificatory categories" for the arguments used in the opinions from *Betts v. Brady*, 316 U.S. 455 (1942), and *Gideon v. Wainwright*, 372 U.S. 335 (1963). Jones's categories include intention of the framers; history; requirements of later precedents or chain of precedents; adaptive (no precedents exist for the current case); current usage (no existing precedent, but other bodies use the "trend of the decision"); literal meaning; depreciation of the original decision (the primary focus "is in refuting the original decision by subsequent decision"); and, pragmatic proposals (those "primarily concerned with practicality and gaining adherence to questions of policy"). See Stephen B. Jones, "Justification in Judicial Opinions: A Case Study," *Journal of the American Forensic Association* 12 (1976): 122.

types of legal arguments that Justices utilize in their opinions,[226] though most of the schemes focus on a few select Court cases rather than examining a corpus of works from a single Justice.

Within the legal field, scholars also endeavor to develop comprehensive accounts to explain the types of legal arguments utilized within the field and those most commonly found in judicial opinions. Two leading scholars, Neil MacCormick[227] and Douglas Walton,[228] developed exhaustive lists of various argument types and schemes,

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[226] For two different classification schemes, see Richard H. Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation," *Harvard Law Review* 100 (1987): 1189-1209, and Jones, "Justification in Judicial Opinions," 122. Other scholars have created a classification scheme for the types of arguments lawyers pose before judges or juries during trials. See Sally Asbell Sheppard and Richard D. Rieke, "Categories of Reasoning in Legal Argument," in *Argument in Transition: Proceedings of the Third Summer Conference on Argumentation*, ed. David Zarefsky, Malcolm O. Sillars, and Richard D. Rieke, 235-250 (Annandale, VA: Speech Communication Association, 1983). Rodgers studied Justice William O. Douglas' first amendment opinions and developed an argument classification scheme that includes the "Argument from Ideal: The Natural Law Warrant," which encompasses arguments that draw their warrants from natural law; the "Argument from Rule: The Positive Law Warrant," which includes arguments whose warrants derive from legal positivism and that center on statutory or case-law rules; and, the "Argument from Context: The Legal Realist Warrant," which includes those arguments grounded in legal realism that refer to social goals. See Rodgers, "Generic Tendencies in Majority and Non-Majority Supreme Court Opinions," 232-236.

[227] MacCormick developed three "categories of interpretive argument:" linguistic arguments, which are "either the ordinary meaning or the technical meaning of terms used in legal texts; systemic arguments, "which work towards an acceptable understanding of a legal text seen particularly in its context as part of a legal system," such as the arguments from contextual harmonization, from precedent, from analogy, from general principles of law, from history, and the logical-conceptual argument; and, teleological-evaluative/deontological arguments, which examine the aim or the end of a legal text in an effort to make sense of that aim or end. See Neil MacCormick, "Argumentation and Interpretation in Law," *Ratio Juris* 6 (1993): 20-26. Also see MacCormick, *Rhetoric and the Rule of Law*, 121-142. For a similar discussion, and which categorizes the interpretive argument types as historical (or genetic), grammatical, and systematic, see H. José Plug, "Reconstructing and Evaluating Genetic Arguments in Judicial Decisions," *Argumentation* 19 (2005): 447-458.

[228] See, for example, Douglas Walton, "Argumentation Schemes: The Basis of Conditional Relevance," *Law Review of Michigan State University – Detroit College of Law* (2003): 1205-1242, and Walton, Reed, and Macagno, *Argumentation Schemes*. Walton and his colleagues identify four key figures "in the

though for those not trained in the intricacies of the law, their work remains limited primarily to law students, other legal scholars, and legal practitioners. Recognizing that few laypersons study and understand the complexities of the law, and therefore lack an interest in reading judicial opinions, one law professor aimed to bridge that divide, and his work on argument schemes offers a more accessible and focused approach for studying the types of legal arguments utilized within judicial opinions.

Philip Bobbitt's "Argument Archetypes"

University of Texas Law Professor Philip Bobbitt published two groundbreaking books on legal argumentation: *Constitutional Fate: Theory of the Constitution*, in 1982, and a follow-up book ten years later, *Constitutional Interpretation*.[229] Bobbitt's books generated both widespread acclaim and controversy among legal academics,[230] yet most

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modern age" whose argumentation schemes have impacted significantly the study of reasoning in argumentation and which "may be considered the basis of the most important theories of contemporary argumentation:" Perelman and Olbrecht-Tyteca's *The New Rhetoric* and their "set of thirteen argumentation schemes;" Toulmin's *The Uses of Argument*; and, "Hastings' work on the modes of reasoning in argumentation," which includes nine modes and three classes of argument: verbal reasoning (argument from analogy, from criteria to a verbal classification, and from definition); causal reasoning (argument from sign, from cause, and from circumstantial evidence); and, verbal or causal reasoning (argument from comparison, from analogy, and from testimony). See Walton, Reed, and Macagno, *Argumentation Schemes*, 300-301, 303, and Arthur C. Hastings, "A Reformulation of the Modes of Reasoning in Argumentation," Ph.D. dissertation, Northwestern University, Evanston, IL, 1963.

[229] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), and Philip Bobbitt, *Constitutional Interpretation* (Cambridge, MA: Basil Blackwell, Inc., 1991). For a review of the *Constitutional Fate*, see Dennis M. Patterson, "Conscience and the Constitution [book review]," *Columbia Law Review* 93 (1993): 270-308.

[230] For the divided views on Bobbitt's approach, see especially "Symposium: In Praise of Bobbitt," *Texas Law Review* 72 (1994): 1703-1967. For both a discussion and criticism of Bobbitt's approach to studying judicial opinions, see Sanford Levinson, "The Rhetoric of the Judicial Opinion," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz, 187-205 (New Haven, CT: Yale University Press, 1996), and Patterson, "Conscience and the Constitution," 270-308. For scholarship that utilizes Bobbitt's methodology, see Marc E. Gold, "The Rhetoric of Constitutional Argumentation,"

agreed that his innovative method for studying legal arguments significantly transformed the manner in which legal practitioners, scholars, and law schools could approach the practice, teaching, and study of the law.[231]

In his books, Bobbitt addressed the debate over the questions surrounding the legitimacy of and justification for judicial review, and he staked out his position in the debate by creating six categories for which legal arguments within a judicial opinion could be placed. Rather than solely categorizing based on the traditional 'type' of legal argument (such as analogical, definitional, etc.), Bobbitt attempted to clarify the ongoing debate by developing a scheme for evaluating the larger argumentative strategy for which a particular argument 'type' served within the text of a judicial opinion. Bobbitt's scheme situated legal arguments within what he termed the six argument archetypes, or modalities:

> These six modalities of constitutional argument are: the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary 'man on the street'); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the

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University of Toronto Law Journal 35 (1985): 154-182 and Markovits, *Matters of Principle*, 184-188. Markovits offers a near replica of Bobbitt's methodology, but with slight variations. As he explains, "[M]y jurisprudential position differs in various critical respects from Philip Bobbitt's, [but] I have borrowed significantly and profited substantially from his work. This section delineates the four basic parts of Bobbitt's analysis and explains my response to each." For Markovits' criticism of Bobbitt's modalities, see chapter 2, "Alternatives," section 11, 184-188.

[231] Law Professor Dennis Patterson, for example, argues that "Bobbitt's book represents a major contribution to legal philosophy…he communicates a genuine sense of how one marshals the power of legal argument…" See Patterson, "Conscience and the Constitution," 307.

> Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).[232]

According to Bobbitt, "arguments are conventions," and "the Court hears arguments, reads arguments, and ultimately must write arguments, all within certain conventions."[233] For Bobbitt, a Justice both interprets and advances an argument within one or more of the modalities; consequently, understanding a judicial opinion requires an understanding of how a Justice utilizes a legal argument 'type' within one or more modalities to justify and rationalize the resolution of the legal or constitutional issue before the Court. At the same time, as law professor Sanford Levinson notes, Bobbitt's modalities "present a morphology of legal argument, a grammar of lawtalk [sic]," which subsequently offers a way for demystifying the challenges of understanding judicial opinions.[234]

Consistent with Bobbitt's approach to the study of the Court and its opinions, and with the recognition that Justices experience "ideological drift" during their tenure on the Court, this project argues that initially attempting to discern the ideology or philosophy of a Justice requires that critics move beyond assigning convenient labels to a Justice and instead shift their focus to how a Justice utilizes the modalities for the overall argumentative or rhetorical strategy within an opinion, as the selection of one or

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[232] Bobbitt, *Constitutional Interpretation*, 12-13.

[233] Bobbitt, *Constitutional Fate*, 6-7.

[234] While Levinson concedes that "it is a notorious truth about *Constitutional Fate* that it does not remotely offer a way of choosing among the six legal-grammatical modalities that Bobbitt discusses," Levinson nonetheless concludes that he "view[s] it as a strength" of the argument-discerning enterprise. See Levinson, "The Audience for Constitutional Meta-Theory," 398.

more modalities best reflects the ideology or philosophy to which the Justice adheres at that time and which guides the Justice in his or her resolution of the instant case (i.e. the present case that the Court is resolving). Approaching a study from this vantage, therefore, requires a thorough explanation of each modality.

The Historical Modality

In his "Preface to the Debates in the Convention," James Madison wrote that the new "United States, of North America" was "a system without a[n] example ancient or modern, a system founded on popular rights, and so comb[in]ing a federal form with the forms of individual Republics, as may enable each to supply the defects of the other and obtain the advantages of both."[235] Madison and his contemporaries thus embarked in 1787 on a journey to establish a structure for a Federal government, and they ultimately drafted a "document that sets up the rules, procedures, and principles of the democratic Republic of the United States"—the Constitution, which became "the supreme Law of the Land."[236] Madison dutifully recorded the debates, discussions, and opinions regarding the founding of the Republic that took place in Philadelphia.[237] The dialogue did not remain confined to the floor of the Convention; both supporters and opponents of a federal Republic also carried out their debates and discussions via a compilation of

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[235] James Madison, *Notes of Debates in the Federal Convention of 1787* (Athens: Ohio University Press, 1966), 3.

[236] Adrienne Koch, "Introduction," in *Notes of Debates in the Federal Convention of 1787*, v-xxiii (Athens: Ohio University Press, 1966), v.

[237] For more on Madison's efforts, see Edward J. Erler, "James Madison and the Framing of the Bill of Rights: Reality and Rhetoric in the New Constitutionalism," *Political Communication* 9 (1992): 213-229.

essays in a two-volume book and in the press through articles and opinion pieces that ran in state and local newspapers.[238] This corpus of documents—*The Federalist Papers*—left by the "Founding Fathers" of the Republic and the framers and ratifiers of the Constitution provide a historical record of that journey.

Bobbitt bases the first archetype in his typology, the historical argument, on this corpus of documents and the historical record provided by the "Founding Fathers." The historical argument holds as its central premise that Justices should decide cases based on the "intent of the draftsmen of the Constitution and the people who adopted the Constitution."[239] According to Bobbitt, the historical argument "depend[s] on a determination of the original understanding of the constitutional provision to be construed," which often involves drawing inferences from the "the controversies, the attitudes, and decisions of the period during which the particular constitutional provision to be construed was proposed and ratified."[240]

When reasoning from the historical argument to determine the legality or constitutionality of the issue before the Court, then, a Justice interprets the relevant provision based on the historical evidence left by the framers and ratifiers (original intent), or based on the historical meaning of a word, phrase, clause, etc. at the time in

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[238] *The Federalist* appeared in book form in 1788: the first volume in March and the second volume in May. See Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010), 257.

[239] Bobbitt, *Constitutional Fate*, 7.

[240] Bobbitt, *Constitutional Fate*, 9, 7. Also see Winters, "Logic and Legitimacy," 303. For a discussion on the Framers' "specific" or "concrete" intent versus their "general" or "abstract" intent, see Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation," 1198-1199.

which that word, phrase, clause, etc. was written (original meaning).[241] The central aim in the use of the historical modality is to ground the Justice's reasoning in the historical text(s) to demonstrate that the Justice arrived at a decision based on evidence rather than on the Justice's ideology, preferences, predispositions, or preconceived notions about the legality or constitutionality of the issue(s) at hand.

By citing *The Federalist Papers* as the primary historical record about the founding of the Republic and her new Constitution, Justices attempt to support their legal reasoning by demonstrating that the manner in which they reached a decision remains true to the original constitutional ideals set forth by the framers. To accomplish this end, the Justices can utilize *The Federalist* in one of three ways: first, "as a source of wisdom that might enlighten the Court on how to interpret the Constitution in a particular case;" second, to demonstrate the existence of "a reliance-based contract theory" in which a citation to *The Federalist* reflects the belief "that the delegates to the various state ratifying conventions read the essays and relied on their explanations of the Constitution in voting to ratify;" and, third, to "display how the text of the Constitution was originally understood."[242] At the same time, by referencing *The Federalist* or one of its most important contributors—Alexander Hamilton, John Jay, or James Madison—the Court can "establish its own ethos as an institution" by "draw[ing] on the ethos of the

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[241] As Cumberland argues, "The shift from original intent to original meaning was basically a shift from a focus on the framers' subjective intentions to a focus on the text's objective meaning during the framers' time," an effort to "abandon…subjective intentions in favor of objective meanings." Cumberland, "Originalism, in a Nutshell," 52, 55.

[242] David McGowan, "Ethos in Law and History: Alexander Hamilton, *The Federalist*, and the Supreme Court," *Minnesota Law Review* 85 (2001): 755-756.

authors themselves."[243] In so doing, the Justices attempt to demonstrate that they "are seeking to rule on 'the law' and not on their 'preferences.'"[244] The Justices, therefore, aim not to appear as ideologues promoting a particular political party's position but instead strive to appear as defenders of the Constitution, as entrusted to them by the framers and ratifiers of that document.

In fact, Justices on the modern-era Courts are utilizing more frequently the historical modality in their majority and plurality opinions, as *The Federalist Papers* "are by common convention now presumed to constitute authoritative (and convenient) evidence of the intent of the Framers,"[245] and "many of the most controversial cases over the past several years" include references to *The Federalist*.[246] One legal scholar, in his study of the Rehnquist Court, observed that "the modern Court has presumed the papers' interpretive value. . . . in discussing the evolution of constitutional principles and

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[243] McGowan, "Ethos in Law and History," 757-758.

[244] McGowan, "Ethos in Law and History," 824.

[245] Post, "Theories of Constitutional Interpretation," 22.

[246] Pamela C. Corley, Robert M. Howard, and David C. Nixon, "The Supreme Court and Opinion Content: The Use of the *Federalist Papers*," *Political Research Quarterly* 58 (2005): 329. See, for example, Justice Ruth Bader Ginsburg's dissenting opinion in *Bush* v. *Gore*, 531 U.S. 98 (2000). Citing Alexander Hamilton's *Federalist* No. 78, Ginsburg writes: "The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments." In his dissenting opinion in the same case, Justice Stephen Breyer cited a statement from James Madison's July 25, 1787, debate and referred to the Framers' intent: "Madison, at least, believed that allowing the judiciary to choose the presidential electors 'was out of the question' . . . The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal presidential elections is as wise as it is clear." According to the authors, "the Federalist Papers were cited at least once in a Supreme Court opinion 236 times in the last 40 years" (p. 330).

doctrines, the modern Court has frequently consulted *The Federalist* as its first source."[247]

The Justices' reliance on *The Federalist*, however, often calls into question the validity of the historical modality. For example, "in a significant number of cases" in which the majority or plurality opinion references *The Federalist*, the concurring and/or dissenting opinions also will reference *The Federalist* to demonstrate that the majority or plurality opinion actually departs from the Founders' ideals.[248] As a result, Professor Matthew Festa suggests, "history can be—and, in fact is—used to support different sides of many legal arguments."[249] Legal scholar James Wilson offers a more critical assessment of the Justices' use of *The Federalist*:

> [T[he Court has never significantly altered its techniques for using *The Federalist* in constitutional adjudication. Passages have been cited (although frequently out of context), ignored (although *The Federalist* had been shown to support an opposing argument), or even rejected (when the changed times argument dictated a different result), depending on the position a justice wanted to advance. Rarely has the Court gone beyond the immediate passages of *The Federalist* to determine its meaning or significance. Indeed, *The Federalist* has been relied on mostly as a means of persuasion.[250]

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[247] James G. Wilson, "The Most Sacred Text: The Supreme Court's Use of *The Federalist* Papers," *Brigham Young University Law Review* 1985 (1985): 83.

[248] See Corley, Howard, and Nixon, "The Supreme Court and Opinion Content," 335-337. For additional insight on the Justices' use and misuse of the *Federalist Papers*, see John J. Hasko, "Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions," *Law Library Journal* 94 (2002): 427-457, and Wilson, "The Most Sacred Text," 65-135.

[249] Matthew J. Festa, "Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing *The Federalist*, 1986-2007," *Seattle University Law Review* 31 (2007): 76-77.

[250] Wilson also argues that "the Court's frequent reliance on *The Federalist* to determine the meaning of the Constitution arguably conflicts with the Framers' intentions." Wilson, "The Most Sacred Text," 99. For an additional critique on the use of *The Federalist*, see Eskridge, Jr., "Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?" 1301-1323.

Ronald Kahn echoes Wilson's criticism, and Kahn contends that "[m]ost justices tend to be quite undisciplined in their use of Founding materials and arguments."[251] Historian Pauline Maier offers an equally critical point. She notes that at the time in which the framers were meeting to discuss the Constitution, and at the height of the circulation of *The Federalist* to the conventioneers, "most delegates to the [June 1788] Virginia convention had probably never seen *The Federalist*—or, for that matter, many other essays on the Constitution."[252] Despite these flaws, however, the Justices continue to rely on *The Federalist* (and other historical records from the framers and ratifiers of the Constitution) to support their reasoning by utilizing the historical modality, even though so doing, according to David McGowan, "is a mistake and places upon those essays a burden they cannot carry."[253]

The Textual Modality

The second archetype in Bobbitt's scheme is the textual argument. As Bobbitt explains, textual arguments are "drawn from a consideration of the present sense of the words of the provision," and "textual arguments rest on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument."[254] From a practical standpoint, the strength of the textual argument is that it "argues from the words of the Constitution

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[251] Kahn, *The Supreme Court and Constitutional Theory*, 69.

[252] Maier, *Ratification: The People Debate the Constitution,* 257.

[253] McGowan, "Ethos in Law and History," 825.

[254] Bobbitt, *Constitutional Fate*, 7, 26.

alone, as they would be understood by contemporary readers."[255] Thus, one need not be trained in "law-talk" to understand concepts such as 'free speech,' or 'due process,' or 'liberty;' those concepts mean what laypersons interpret them to mean. From a judicial standpoint, the textual argument encourages judicial restraint since judges "take their charter from a text and [they] do not have to rely on themselves to make up a rule."[256] Similar to reasoning from the historical argument, reasoning from the textual modality forces Justices to base their decisions on a 'text,' such as a statute or agency regulation, rather than on their own ideologies or preferences; Justices interpret the Law/law rather than make the Law/law.

As with the historical argument, however, the textual argument introduces problems of its own. As Bobbitt concedes, "[o]ne corollary of the textual approach is a disregard for precedent."[257] A Justice can decide that a previous Court incorrectly defined or interpreted a word (such as 'privacy' in *Roe* v. *Wade*[258]) or a phrase (such as 'reasonable search and seizure') based on 'contemporary meaning.' In so deciding, the Justice can offer a new definition or interpretation and then either ignore prior Court precedent or take a more unrestrained approach and overrule a prior precedent. As a result, reliance on 'contemporary meaning' risks letting a Justice substitute his or her

[255] Winters, "Logic and Legitimacy," 303.

[256] Bobbitt, *Constitutional Fate*, 34.

[257] Bobbitt, *Constitutional Fate*, 33.

[258] 410 U.S. 113 (1973).

definition or interpretation for how that word or phrase is 'understood' by the public, agency, or Congress.

An additional problem that arises from the use of the textual modality involves the confusion between a 'textual argument' and 'textualism' as a judicial philosophy. A Justice who reasons by utilizing a textual argument "asks what the meaning of the text actually used in the Constitution is, a result that can vary from what the Constitution may have meant to a person in the Framers' day."[259] A Justice, such as Antonin Scalia, who approaches deciding cases as a textualist, asks "what the Framers intended the text to mean," which clearly discounts the "contemporary meaning" standard of the textual argument.[260] Professor Fallon clarifies the argument versus philosophy confusion. According to Fallon, there exists "an important distinction between arguments *about* the text and arguments *from* the text." The former are simply "arguments about the text and what it should mean," whereas the latter are "arguments that purport to resolve a question by direct appeal to the Constitution's plain language" which "either requires or forbids a certain conclusion."[261] As Fallon explains, "arguments from the text can fulfill three functions." First, they "require a unique conclusion," such as the stipulation in the

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[259] Jeffrey D. Jackson, "The Modalities of the Ninth Amendment: Ways of Thinking about Unenumerated Rights Inspired by Philip Bobbitt's *Constitutional Fate*," *Mississippi Law Journal* 75 (2006): 516-517.

[260] Jackson, "The Modalities of the Ninth Amendment," 517. As Jackson notes, Scalia uses both historical and textual arguments to ground his textualist approach. For more on Scalia's textualist approach, see Schultz and Smith, *The Jurisprudential Vision of Justice Antonin Scalia*.

[261] Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation," 1195. Subsequent quotes within this paragraph on the "three functions" of arguments from the text are from this page.

Constitution that the president holds a term of office for four years.[262] Second, they exclude "one or more positions that might be argued for on nontextual grounds." The Constitution's text, for example, does not definitively specify a timeframe for "a speedy and public trial,"[263] but the language of the amendment does prohibit an indefinite incarceration without the accused party receiving an appearance before an action which can be credibly described as a "trial." Third, in situations in which meanings "are not excluded by arguments from text, a narrowly text-focused reading will sometimes yield the conclusion that some [meanings] are more plausible than others." Such a reading, therefore, may elucidate whether possessing live hand grenades or positioning a functional battlefield tank on one's front lawn enjoys protection as a "right of the people to keep and bear arms."[264] While somewhat difficult between which to distinguish, understanding the marked difference of the textual argument and the textualist philosophy clarifies Bobbitt's modality.

The Structural Modality

The third archetype in Bobbitt's scheme is the structural argument, which is "grounded in the actual text of the Constitution."[265] Unlike the historical and textual arguments, which focus on narrower aspects or specific parts of the Constitution, the structural argument addresses "the relationships the Constitution seems to mandate,"

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[262] Article II, Section 1.

[263] Amendment 6.

[264] Amendment 2.

[265] Bobbitt, *Constitutional Fate*, 80.

such as the existence of institutional structures or the division of power between the three branches of government.[266] As Bobbitt explains, Justices usually construct a rather simple line of reasoning when they utilize the structural argument: first, they introduce an "uncontroversial statement" about a constitutional structure; next, they infer a relationship about the structure; third, they make "a factual assertion about the world;" and, finally, they draw a conclusion about the relationship that provides the applicable rule(s) for the instant case.[267]

Use of the structural argument serves several important functions for the Justice writing the opinion, especially when the central issue in the instant case involves whether the plaintiff or respondent acted within or exceeded its authority. The modality limits judicial discretion since the Justice reasons from the constitutional text rather than creates a new rule about an institutional structure. The modality also ties the Justice to existing law or precedent, as the Justice can evaluate the instant case and its legal and/or constitutional questions against prior intergovernmental or Court decisions.

The Doctrinal Modality

When the Supreme Court renders a decision on the constitutional or legal issues in a case, the Court issues its 'holding,' or the rules and principles derived from the Court's decision in the case. The holding(s) in each Court opinion provides an ongoing body of case law, known as precedent, to which the Justices can turn to resolve

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[266] For further explanation of the structural modality, see Gold, "The Mask of Objectivity," 487; Jackson, "The Modalities of the Ninth Amendment," 537; and, Winters, "Logic and Legitimacy," 303.

[267] Bobbitt, *Constitutional Interpretation*, 16.

subsequent cases that raise similar issues. Future Courts and lower courts, therefore, are expected to adhere to the principle of *stare decisis,* which is the practice of following Court precedent, to decide subsequent cases. As S.J. Balter explains, the legal community expects judges to "justify their opinion by relating it to other cases; i.e. use precedent."[268]

Bobbitt bases the fourth archetype, the doctrinal argument, in his scheme on these concerns with precedent and *stare decisis*. As Bobbitt explains, a doctrinal argument is one "that asserts principles derived from precedent or from judicial or academic commentary on precedent," and the "doctrinal approach treats the United States Supreme Court as though it were the last, best appellate tribunal."[269]

Justices who advance doctrinal arguments in their reasoning can accomplish two goals. First, use of the doctrinal argument reflects judicial restraint since the Justices are, as Bobbitt explains, "dispassionate, disinterested justices who arrive at decisions by a process of reason applied to doctrine . . . precedent, institutional doctrines, and doctrines of construction."[270] Second, use of the doctrinal argument allows Justices to appear that they adhere to the "rule of law;" that is, they follow the law rather than make the law. The Justices' reasoning reflects a respect for "legislative policy making" and "judicial rule applying," which is, according to Bobbitt, "a reasoned process of deriving the

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[268] S. J. Balter, "The Search for Grounds in Legal Argumentation: A Rhetorical Analysis of Texas vs Johnson," *Argumentation* 15 (2001): 387. Also see Lindquist and Cross, "Empirically Testing Dworkin's Chain Novel Theory," 1159.

[269] Bobbitt, *Constitutional Fate*, 7, 46.

[270] Bobbitt, *Constitutional Fate*, 47 Also see Frug, "Argument as Character," 872.

appropriate rules and following them . . . without regard to any fact not relevant to the rules . . . "[271] Bobbitt cites Justice Oliver Wendell Holmes and Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit as two of the premier doctrinal judges.[272]

Use of the doctrinal argument, however, poses problems as well. Justices do not interpret nor apply precedential decisions in the same manner. As Hunter notes, "two eminent jurists can reason about the same issue, using the same precedents, *but come to completely different conclusions*."[273] Justices also can deviate from adhering to the principle of *stare decisis*. As Professor of Law Erwin Chemerinsky observes, the Court can overturn precedent by finding previous holdings "aberrations and its current interpretation as the long-standing approach, even when that is not at all the case,"[274] or as Levinson suggests, precedent "can be overridden in the name of some other important value."[275] Scholars continue to debate why the Justices overturn precedent, and answers

[271] Bobbitt, *Constitutional Fate*, 41.

[272] See Bobbitt, *Constitutional Fate*, 53, 63. According to Bobbitt, "Holmes [was] the greatest modern doctrinal justice" and Friendly was a "doctrinal Circuit" court judge.

[273] Dan Hunter, "Reason is too Large: Analogy and Precedent in Law," *Emory Law Journal* 50 (2001): 1201. Italics in original.

[274] Chemerinsky, "The Rhetoric of Constitutional Law," 2018.

[275] Levinson, "The Rhetoric of the Judicial Opinion," 193.

range from the Justices' ideological leanings and policy preferences, to the strength of the majority coalition, or to the age of the precedent being overturned.[276]

The Ethical Modality

The fifth archetype in Bobbitt's scheme is the ethical argument, which "arise[s] from the ethos of limited government and the seam where powers end and rights begin."[277] The ethical argument, for Bobbitt, allows Justices to argue that constitutional barriers exist that prevent the government, especially legislators, from exceeding their authority to impose or restrict rights.[278] Consequently, the ethical argument "confines governments in few respects [and] it provides an absolute bar as to the rights it does protect. This can provide an easily replicated decision procedure."[279] Use of the ethical argument, therefore, allows Justices to uphold the "moral principles that seem immanent in the Constitution,"[280] and the argument restrains Justices from "reading" new rights into the Constitution and it allows Justices to protect rights when the government exceeds its authority to unduly restrict rights or too broadly extend them.

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[276] For a more detailed discussion, see James F. Spriggs, II, and Thomas G. Hansford, "Explaining the Overruling of U.S. Supreme Court Precedent, *Journal of Politics* 63 (2001): 1091-1111, and Spriggs, II, and Hansford, "The U.S. Supreme Court's Incorporation and Interpretation of Precedent," 139-160.

[277] Bobbitt, *Constitutional Fate*, 162.

[278] See Bobbitt, *Constitutional Fate*, 159-163.

[279] Bobbitt, *Constitutional Fate*, 163.

[280] Winters, "Logic and Legitimacy," 303.

The Prudential Modality

The final archetype in Bobbitt's scheme is the prudential argument, which is "a calculation of the necessity of the act against its costs." As Gold explains, the "[p]rudential argument is consequentialist in focus;" utilization of the argument asks "what is the impact of the decision likely to be?"[281] Justices who utilize the prudential argument evaluate "the relative costs and benefits of reaching a particular constitutional conclusion."[282] The prudential argument, therefore, allows Justices to evaluate and weigh either the restriction or extension of a right or a rule against the impact that restriction or extension would have on the parties affected by the Court's decision.

Bobbitt's Modalities and Rhetorical Criticism

Understanding each modality and how a Justice reasons using that modality as part of a larger argumentative or rhetorical strategy provides insight into that Justice's ideology, philosophy, and/or temperament. As previously discussed, those three concerns about Justices generate two important questions over which scholars continue to debate: Do Justices follow the Law/law, or do they make the Law/law? Conducting an analysis utilizing Bobbitt's modalities allows the critic to examine those two questions.

Bobbitt's approach to examining judicial opinions, though, is not a critical-inquiry panacea. Bobbitt admits that some legal arguments may fall within more than

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[281] Gold, "The Mask of Objectivity," 487. Balkin and Levinson interpret prudential arguments as "which rule would have the best consequences." Jack M. Balkin and Sanford Levinson, "Constitutional Grammar," *Texas Law Review* 72 (1994): 1799. For more on Bobbitt, see Dennis Patterson, "Wittgenstein and Constitutional Theory," *Texas Law Review* 72 (1994): 1837-1855.

[282] Winters, "Logic and Legitimacy," 303.

one modality, which for some scholars undermines the value of his scheme.[283] A more objective view, however, should explain the dilemma as one which necessitates examining a text as a whole to determine the overall argumentative and rhetorical strategy present within the text, as well as determine whether the dilemma involves 'constitutional argumentation' or 'constitutional discourse,' which according to Bobbitt are two distinct activities.[284]

Bobbitt's argument scheme complements a rhetorical analysis of judicial texts in two significant ways. First, his scheme allows the critic to determine the purpose for which a particular 'type' of legal argument serves within the opinion, and, based on the selection of that argument 'type' and its subsequent placement within a modality, the critic can assess whether a Justice's reasoning reveals a particular judicial philosophy to

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[283] Powell, for example, notes that Bobbitt's "modalities may and often do conflict," and that "[w]hen such conflicts occur, the system of modalities does not itself provide an answer" for resolving the conflict. H. Jefferson Powell, "Constitutional Investigations," *Texas Law Review* 72 (1994): 1740. Balkin and Levinson identify additional problems with Bobbitt's modalities: "there may be more than one way of characterizing and cataloguing the various forms of constitutional discourse;" "his theory assumes a basic homogeneity of argumentative practices" and "has difficulty accounting for the possibilities of changes in our constitutional grammar;" and, like Powell's claim, there are "intra-modal conflicts." See Balkin and Levinson, "Constitutional Grammar," 1784-1797. Tushnet notes that "the scholarly community finds Bobbitt's work disconnected from its own concerns and self-absorbed in a way that is quite alienating," and "both of these reactions are correct, although neither amounts to a substantial criticism of Bobbitt's work." Mark Tushnet, "Justification in Constitutional Adjudication: A Comment on *Constitutional Interpretation*," *Texas Law Review* 72 (1994): 1708-1709. For more on Bobbitt, see Patterson, "Wittgenstein and Constitutional Theory," 1837-1855.

[284] Bobbitt directs his response to Balkin and Levinson's criticism. Bobbitt defines 'constitutional argument' as "an activity confined to those persons whose decisions must be explained in terms of legal argument," and 'constitutional discourse' as "an activity . . . which may include legal argument, but which . . . is not confined to legal argument." See Philip Bobbitt, "Reflections Inspired by My Critics," *Texas Law Review* 72 (1994): 1911. In a later writing, Levinson conceded "that Bobbitt's schema helps us to understand the constitutional discourse of opinions written by members of the U.S. Supreme Court . . . " Levinson, "The Rhetoric of the Judicial Opinion," 191.

which the Justice adhered in his or her decision-making, as evidenced by the overall argumentative and/or rhetorical strategy that characterizes the legal reasoning within the opinion.[285] Bobbitt's argumentation scheme, therefore, provides a more fruitful approach for examining whether Justices adhere to one or more judicial philosophies when they provide a justification and rationale for resolving the legal or constitutional issue(s) of a case.

Second, Bobbitt's argumentation scheme supports Scallen's rationale for examining legal texts from the rhetorical critic's perspective. Situating a 'type' of legal argument within a modality provides a more holistic account of how a Justice engages in the legal reasoning process. By evaluating how 'the parts make up the whole,' the critic offers an instructive method for demonstrating how to (or how not to) construct an effective piece of argumentative and/or persuasive legal discourse. Additionally, Bobbitt's scheme contributes to the reconstructive effort of rhetorical criticism, as viewing how a Justice utilized argument(s) and modalities in his or her opinion may reveal the unknown: adherence to one or more judicial philosophies, the advocacy of a particular policy agenda or preference, or some other surprising discovery that only a holistic reading and evaluation of the opinion can provide. Finally, Bobbitt's scheme allows the critic to assess whether a Justice's use of one or more modalities and the rationale for the decision provided a fitting response to the constitutional or legal issues

[285] As an example which supports my contention, see Jackson, "The Modalities of the Ninth Amendment," 495-544. In their study of Court opinions, Golden and Makau suggest that "Supreme Court judicial reasoning offers a complete model of argumentation." Golden and Makau, "Perspectives on Judicial Reasoning," 173.

of the case. Against this assessment, then, the critic could suggest a more applicable argument type or modality that could have provided a more fitting response if the evaluation uncovered weaknesses in the Justice's resolution of the case. Bobbitt's modalities, therefore, complement Scallen's position, and both legal scholars' work provides a justification for (re)defining legal rhetoric as the use of argumentative strategies within a text to advance a position and to ground the rationale and reasoning for that position.

Legal Argument 'Types'

Interdisciplinary scholarship on traditional arguments[286] and legal arguments[287] covers a wide body of research. Utilizing Bobbitt's modalities as an approach to the

[286] For general discussions of arguments and argumentation, see A. Cheree Carlson, "How One Uses Evidence Determines Its Value," *Western Journal of Communication* 58 (1994): 20-24; G. Thomas Goodnight, "The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation," *Journal of the American Forensic Association* 18 (1982): 214-227; Dale Hample, "Predicting Immediate Belief Change and Adherence to Argument Claims," *Communication Monographs* 45 (1978): 219-228; Dale Hample, "Predicting Belief and Belief Change Using a Cognitive Theory of Argument and Evidence," *Communication Monographs* 46 (1979): 142-146; Dale Hample, "A Third Perspective on Argument," *Philosophy and Rhetoric* 18 (1985): 1-22; A. Francisca Snoeck Henkemans, "State-of-the-Art: The Structure of Argumentation," *Argumentation* 14 (2000): 447-473; Joel Katzav and Chris A. Reed, "On Argumentation Schemes and the Natural Classification of Arguments," *Argumentation* 18 (2004): 239-259; Rowland, "The Influence of Purpose on Fields of Argument," 228-245; Rowland, "On Defining Argumentation," 140-159; Joseph W. Wenzel, "On Fields of Argument as Propositional Systems," *Journal of the American Forensic Association* 18 (1982): 204-213; David Zarefsky, "Persistent Questions in the Theory of Argument Fields," *Journal of the American Forensic Association* 18 (1982): 191-203; and, Margaret D. Zulick, "Generative Rhetoric and Public Argument: A Classical Approach," *Argumentation and Advocacy* 33 (1997): 109-119.

[287] For general scholarship on legal arguments and legal argumentation, see Jack M. Balkin, "A Night in the Tropics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz, 211-224 (New Haven, CT: Yale University Press, 1996); Bertea, "Certainty, Reasonableness and Argumentation in Law," 465-478; Jon Bruschke, "Deconstructive Arguments in the Legal Sphere: An Analysis of the Fischl/Massey Debate about Critical Legal Studies," *Argumentation and Advocacy* 32 (1995): 16-25; Jon Bruschke, William Trapani, Scott McWilliams, and Josh Zive, "Comparing Debate Judges and Supreme Court Justices: An Attempt to

rhetorical criticism of legal texts, especially judicial opinions, requires an understanding of the most prevalent legal argument 'types' used within the legal discipline. The following section of the project, therefore, reviews the 'types' of arguments found within legal texts and judicial opinions, such as the argument from analogy,[288] the argument

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Explain Judicial Decision-Making," *Speaker and Gavel* 34 (1997): 39-50; Feteris, "A Survey of 25 Years of Research on Legal Argumentation," 355-376; Eveline T. Feteris, "The Rational Reconstruction of Complex Forms of Legal Argumentation: Approaches from Artificial Intelligence and Law and Law and Pragma-Dialectics," *Argumentation* 19 (2005): 393-400; Gold, "The Rhetoric of Constitutional Argumentation," 154-182; Goodrich, "Rhetoric as Jurisprudence," 88-122; Maarten Henket, "On the Logical Analysis of Judicial Decisions," *International Journal for the Semiotics of Law* 5 (1992): 153-164; Hermann, "Legal Reasoning as Argumentation," 467-510; E. P. Krauss, "Historical Vision and Revisionist History: Essays on the Interpretation of Legal Texts," *Northern Kentucky Law Review* 12 (1985): 1-35; Alain Lempereur, "Logic or Rhetoric in Law?" *Argumentation* 5 (1991): 283-297; MacCormick, "Argumentation and Interpretation in Law," 16-29; Markovits, *Matters of Principle*; Sara E. Newell and Richard D. Rieke, "A Practical Reasoning Approach to Legal Doctrine," *Journal of the American Forensic Association* 22 (1986): 212-222; Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (Dordrecht, Holland: D. Reidel Publishing Company, 1980); Richard D. Rieke, "Investigating Legal Argument as a Field," in *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation*, ed. George Ziegelmueller and Jack Rhodes, 152-158 (Annandale, VA: Speech Communication Association, 1981); Robert Rowland, "Argument Fields," in *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation*, ed. George Ziegelmueller and Jack Rhodes, 56-79 (Annandale, VA: Speech Communication Association, 1981); Brett G. Scharffs, "The Character of Legal Reasoning," *Washington & Lee Law Review* 61 (2004): 733-786; and, Walton, "Argumentation Schemes," 1205-1242. On morally-legitimate legal arguments, see Richard S. Markovits, "Taking Legal Argument Seriously: An Introduction," *Chicago-Kent Law Review* 74 (1999): 317-344; Richard S. Markovits, "Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions," *Chicago-Kent Law Review* 74 (1999): 415-497; Jack M. Balkin and Sanford Levinson, "Getting Serious about 'Taking Legal Reasoning Seriously,'" *Chicago-Kent Law Review* 74 (1999): 543-558; and, Richard S. Markovits, "'You Cannot be Serious!': A Reply to Professors Balkin and Levinson," *Chicago-Kent Law Review* 74 (1999): 559-614.

[288] Scholarship on the argument from analogy includes Scott Brewer, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy," *Harvard Law Review* 109 (1996): 923-1028; Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed. (New York: Aspen Publishers, 2007); Feteris, "A Survey of 25 Years of Research on Legal Argumentation," 365-366; Jaap Hage, "The Logic of Analogy in the Law," *Argumentation* 19 (2005): 401-415; Hunter, "Reason is too Large," 1197-1264; Andre Juthé, "Argument by Analogy," *Argumentation* 19 (2005): 1-27; Kamm, "Theory and Analogy in Law," 405-425; Macagno and Walton, "Argument from Analogy in Law, the Classical Tradition, and Recent Theories," 154-182; and, Emily Sherwin, "A Defense of Analogical Reasoning in Law," *University of Chicago Law Review* 66 (1999): 1179-1197. For a critique of the use on

from coherence,[289] the argument about and from definition,[290] the argument from dissociation,[291] and the institutional argument.[292]

Argument from Analogy

According to law professor Cass Sunstein, "Reasoning by analogy is the most familiar form of legal reasoning."[293] Reasoning from analogy involves "finding the

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analogy in legal reasoning, see Richard A. Posner, "The Jurisprudence of Skepticism," *Michigan Law Review* 86 (1988): 827-891. For scholarship on the argument from example, see Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949) and Wendy Raudenbush Olmsted, "The Uses of Rhetoric: Indeterminacy in Legal Reasoning, Practical Thinking and the Interpretation of Literary Figures," *Philosophy and Rhetoric* 24 (1991): 1-24.

[289] See Stefano Bertea, "Does Arguing from Coherence Make Sense?" *Argumentation* 19 (2005): 433-446, and Stefano Bertea, "The Arguments from Coherence: Analysis and Evaluation," *Oxford Journal of Legal Studies* 25 (2005): 369-391.

[290] For commentary on the argument from definition, consult Kenneth T. Broda-Bahm, "Finding Protection in Definitions: The Quest for Environmental Security," *Argumentation and Advocacy* 35 (1999): 159-170; Brian R. McGee, "The Argument from Definition Revisited: Race and Definition in the Progressive Era," *Argumentation and Advocacy* 35 (1999): 141-158; Edward Schiappa, "Arguing about Definitions," *Argumentation* 7 (1993): 403-417; and, B. Scott Titsworth, "An Ideological Basis for Definition in Public Argument: A Case Study of the Individuals with Disabilities in Education Act," *Argumentation and Advocacy* 35 (1999): 171-184. On persuasive definitions, see Charles L. Stevenson, "Persuasive Definitions," *Mind* 47 (1938): 331-350; Douglas Walton, "Deceptive Arguments Containing Persuasive Language and Persuasive Definitions," *Argumentation* 19 (2005): 159-186; Douglas Walton, "Persuasive Definitions and Public Policy Arguments," *Argumentation and Advocacy* 37 (2001): 117-132; and, David Zarefsky, Carol Miller-Tutzauer, and Frank E. Tutzauer, "Reagan's Safety Net for the Truly Needy: The Rhetorical Uses of Definition," *Central States Speech Journal* 35 (1984): 113-119.

[291] For examples, see Saunders, "Law as Rhetoric, Rhetoric as Argument," 566-578; Edward Schiappa, "Dissociation in the Arguments of Rhetorical Theory," *Journal of the American Forensic Association* 22 (1985): 72-82; and, Stahl, "Carving Up Free Exercise," 439-481.

[292] See Erik Doxtader, "Learning Public Deliberation through the Critique of Institutional Argument," *Argumentation and Advocacy* 31 (1995): 185-203; Sara E. Newell, "A Socio-pragmatic Perspective of Argument Fields," *Western Journal of Speech Communication* 48 (1984): 247-261; and, Steve Schwarze, "Rhetorical Traction: Definitions and Institutional Arguments in Judicial Opinions about Wilderness Access," *Argumentation and Advocacy* 38 (2002): 131-150.

solution to a problem by reference to another similar problem and its solution."[294] Justices usually advance two kinds of argument from analogy. The first, a statutory analogy, compares the regulation, rule, or law in the instant case to a similar regulation, rule, or law from a prior case, and the analogy either explains why the two are comparable or why one is distinguishable from the other. When offering a statutory analogy, a Justice "reasons from a rule already established, applies the rule to the case at hand, and makes her decision regarding the case according to the mandates of the rule."[295] The second kind of analogy, and the one more often advanced in a Court opinion, is the precedential analogy. When offering an analogy based upon Court precedent, the holding in a prior case serves as "the guiding principle" for evaluating the pending issue, and the Justice explains why the issue(s) in the instant case is/are comparable to or distinguishable from the issue(s) in the prior case.[296]

In theory, then, arguments from analogy promote judicial restraint and thereby limit "the power on judges to extend the law" beyond the Court's prior holdings.[297] At

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[293] Cass R. Sunstein, "On Analogical Reasoning," *Harvard Law Review* 106 (1993): 741-791. Also see Olmsted, "The Uses of Rhetoric," 10.

[294] Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (New York: Cambridge University Press, 2005): 4. Also see Brewer, "Exemplary Reasoning," 923-1028.

[295] Klinger, "Rhetoric's Wide-Angle Lenses," 359.

[296] Klinger, "Rhetoric's Wide-Angle Lenses," 359. As Hunter explains, the precedential analogy is "used to predict, explain, or justify the outcome of the currently undecided case." Hunter, "Reason is too Large," 1206. Also see Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (New York: Oxford University Press, 2002), 122-125.

[297] Neil MacCormick, *Legal Reasoning and Legal Theory* (New York: Oxford University Press, 1978): 188.

the same time, as Professor Emily Sherwin explains, "[a]nalogical reasoning . . . is likely to improve the overall quality of judicial reasoning and rulemaking" as it "incorporates the insights of many judges over time. It also works indirectly to protect against insufficient judicial attention to reliance on past decisions."[298] Other scholars, however, view the argument from analogy as a disingenuous attempt to resolve the issue(s) in a case. By relating "one example to another," judges take the liberty to "adjust words and rules" or "invent new words and rules" to fit new cases since "legal terms change as they are used in relation to specific cases."[299] Consequently, use of argument from analogy reflects that "the process of legal argument is rhetorical in nature."[300]

Justices are likely to utilize argument from analogy within three of Bobbitt's argument modalities: historical, textual, and doctrinal. The historical modality allows the writer of the opinion to compare or contrast the issue(s) in the instant case to how the framers and ratifiers of the Constitution viewed the issue(s), while the textual modality allows the opinion writer to compare and contrast the meaning or interpretation of the issue(s) in the instant case to a meaning or interpretation from a prior decision. The doctrinal modality, which focuses on precedent, affords the opinion writer the option to compare or contrast the issue(s) in the instant case to similar issues resolved by a similar

[298] Sherwin, "A Defense of Analogical Reasoning in Law," 1193.

[299] Olmsted, "The Uses of Rhetoric," 11. Judge Posner contends that analogies in Court opinions are "inexact and often . . . misleading." Posner, "Against Constitutional Theory," 233.

[300] Klinger, "Rhetoric's Wide-Angle Lenses," 360.

case. Use of any of the three modalities, therefore, encourages judicial restraint and limits judicial activism, which thereby promotes consistency within the Law/law.

Argument from Authority

Another 'type' of argument found within legal texts is the argument from authority. The Justice who authors the Court's opinion must write in a manner that provides legitimacy for the opinion and credibility for the Court, a process that entails writing an opinion which reflects the absence of that Justice's ideological or policy preferences. To accomplish this goal, a Justice can advance an argument from authority, or what Robert Hume calls "rhetorical sources,"[301] which are "references to prominent authors and texts that are nonbinding on case outcomes." According to Hume, the Justices most often reference and quote from an author of, or an excerpt from, the *Federalist Papers*,[302] though the Justices also reference interpretive authorities, founding documents, respected jurists, and respected non-jurists, such as philosophers and legal scholars.[303] In addition to referencing authorities from rhetorical sources, Justices also

[301] See Robert J. Hume, "The Use of Rhetorical Sources by the U.S. Supreme Court," *Law & Society Review* 40 (2006): 817-843, and Mills, "Legal Argumentation," 83-90.

[302] For more on the use of the *Federalist Papers*, see Corley, Howard, and Nixon, "The Supreme Court and Opinion Content," 329-340; Hasko, "Persuasion in the Court," 427-457; and, Wilson, "The Most Sacred Text," 65-135.

[303] Hume, "The Use of Rhetorical Sources by the U.S. Supreme Court," 818, 823. As examples of interpretive authority, Hume includes the *Federalist Papers*, Joseph Story's *Commentaries on the Constitution*, William Blackstone's *Commentaries on the Laws of England*, and Sir Edmond Coke's writings. Founding documents include the Magna Carta, the Declaration of Independence, and the Preamble to the Constitution. Respected jurists include Justices John Marshall, Oliver Wendell Holmes, Louis Brandeis, and Benjamin Cardozo. Respected nonjurists include Thomas Jefferson, John Locke and John Stuart Mill, and James Bradley Thayer and Woodrow Wilson. One could add other rhetorical sources and people to Hume's list after reading more recent Court opinions.

are citing traditional legal secondary sources,[304] such as articles from law journals, as well as citing Internet resources, many of which are from non-legal sources and which are slowly finding their way into Court opinions.[305]

By referencing authorities other than themselves, the Justices achieve two goals. First, as White explains, "[i]n rhetorical terms, the court gives itself an ethos, or character . . . ;"[306] that is, the Court appears objective in its resolution of the case and the Justices as neutral arbiters in their decision-making. Second, as Gold suggests, "[i]n terms of rhetorical impact, arguments from authority enhance the image of the decision as, in some sense, independent of the values of the court invoking the authority."[307] The historical, doctrinal, and ethical modalities complement the argument from authority, as each modality allows the opinion writer to demonstrate that the expertise of another authority contributed to the rationale for resolving the issue(s) of the instant case.

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[304] Additional secondary sources that opinion authors often reference include, but are not limited to, articles from law journals, excerpts from model law codes or treatises, and citations to restatements of law. See Rountree, "Instantiating 'The Law' and Its Dissents in *Korematsu* v. *United States*," 1-24. On the general process of writing opinions, see Teresa Godwin Phelps, "In the Law the Text is King," in *Worlds of Writing: Teaching and Learning in Discourse Communities of Work*, ed. Carolyn B. Matalene, 363-374 (New York: Random House, 1989); Richard A. Posner, "Judges' Writing Styles (And Do They Matter?)," *University of Chicago Law Review* 62 (1995): 1421-1449; and, Lawrence M. Solan, *The Language of Judges* (Chicago: University of Chicago Press, 1993).

[305] William R. Wilkerson, "The Emergence of Internet Citations in U.S. Supreme Court Opinions," *Justice System Journal* 27 (2006): 323-338. Wilkerson's research reveals that Justices Breyer, Ginsburg, and Scalia are the "three top users of Internet citations" in their opinions, and Justices Kennedy, Stevens, and Thomas, all "relatively late adopters," are more frequently including Internet citations in their opinions. Former Justice Souter was a "relatively light" user, and as appellate court judges, both Chief Justice Roberts and Justice Alito rarely used Internet citations in their opinions, a trend which holds true for their Court opinions.

[306] White, *Justice as Translation*, 102.

[307] Gold, "The Mask of Objectivity," 486.

Argument from Coherence

Another type of argument Justices advance is the argument from coherence.[308] According to MacCormick, "coherence" means "that the multitudinous rules of a developed legal system should 'make sense' when taken together."[309] An argument from coherence aims to "provide reasons for a standpoint by taking into account its placement within the system as well as its relationship with the fundamental goals of the system."[310] There are two types of argument from coherence, the precedential and the prudential.[311] The first type, the precedential argument, promotes judicial restraint and limits judicial discretion, as the argument "establishes a relation of coherence between a solution, on the one hand, and the precedents and rules of a legal system, on the other, [and] it seeks to do justice to the decision-making authorities' duty to be faithful to pre-existing law." The second type, the pragmatic argument, allows Justices to adjust the law so that it fits the contemporary or future needs of society, as the argument "appeals to the system's goals and principles [and] is forward-looking" and "can be used to give voice to the need of innovating the system. In this use, the argument from coherence keeps in view the future of the legal system, and the system itself is conceived of as a set

[308] Some scholars refer to the argument from coherence as the contextual-harmonization argument, or how the argument fits within "the context of the legal system." See Henrike Jansen, "E Contrario Reasoning: The Dilemma of the Silent Legislator," *Argumentation* 19 (2005): 486.

[309] MacCormick, *Legal Reasoning and Legal Theory*, 152.

[310] Bertea, "Does Arguing from Coherence Make Sense?" 438.

[311] As the scholars who write about the argument from coherence do not provide a term for each type, I created a term for each based on the elements and goals of the two types of arguments from coherence.

of goals to be pursued and fulfilled (in the future) rather than as a number of previously formatted rules and precedents prescribing this or that conduct."[312] The doctrinal and structural modalities complement the precedential argument from coherence, and the pragmatic argument from coherence requires Justices to adjust elements of a modality to fit their Court-created Laws/laws, since the pragmatic argument from coherence reflects an activist, rather than a restrained, judicial solution.

Argument about and from Definition

Disputes over the meaning or interpretation of a word or phrase comprise another type of common legal argument.[313] As relevant for the critique of judicial opinions, many communication scholars base their studies about definitional interpretations on Edwin Schiappa's distinction between an argument *about* a definition and an argument *from* definition. The former involves "finding the better definition in the context of resolving some larger disagreement,"[314] while the latter involves resolving issues based on "well-established and uncontroversial definitions."[315] An argument *about* definition, therefore, involves competing interpretations "over [the] preferred meaning" of a term

[312] Bertea, "Does Arguing from Coherence Make Sense?" 438.

[313] As Broda-Bahm suggests, "definitions are most productively thought of as arguments." Broda-Bahm, "Finding Protection in Definitions," 161. Some scholars refer to definitional argument as linguistic argument, or the "appeal to ordinary or technical meaning" of a term. See Jansen, "E Contrario Reasoning," 486. For more on the argument from definition, see Walton, "Persuasive Definitions and Public Policy Arguments," 117-132, and Walton, "Deceptive Arguments Containing Persuasive Language and Persuasive Definitions," 159-186.

[314] McGee, "The Argument from Definition Revisited," 142.

[315] Schiappa, "Arguing about Definitions," 404.

"in a context of previously recognized uses of the term. The 'meaning' that one seeks to alter is not a property of a term *per se* but a use to which the term is put," which usually entails "providing an accurate, perhaps empirical, account of how a term is actually used in practice."[316] The argument *from* definition, on the other hand, "reasons from an uncontroversial definition" of the word or phrase in question. To advance arguments about or from definition, the Court often turns to *Black's Law Dictionary* or an edition of *The American Heritage* or *The American Collegiate Dictionary* "to get just the 'right' definition to affect the holding," though "use of dictionaries by the Court is hardly consistent" and often "begins to border on the bizarre."[317]

Despite the source the Justices reference, argument about or from definition often functions as an integral step in the Justices' reasoning in the instant case. For example, definitional arguments can clarify "when it is 'proper' or 'correct' to use words in a particular way,"[318] such as when statutory questions arise concerning the meaning or interpretation of a word or phrase. Additionally, Justices can use definitional arguments "to clarify ambiguous policy prescriptions,"[319] especially those involving an agency's or institution's rules and regulations. The end result of definitional argument is, as Schiappa explains, "to induce denotative conformity, which is another way of saying that definitions are introduced or contested when a rhetor wants to alter an audience's

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[316] Broda-Bahm, "Finding Protection in Definitions," 161. Italics in original.

[317] Hasko, "Persuasion in the Court," 433.

[318] Schiappa, "Arguing about Definitions," 404.

[319] Schwarze, "Rhetorical Traction," 132.

linguistic behavior in a particular fashion. A successful new definition changes not only recognizable patterns of behavior, but also our understanding of the world."[320] Justices can utilize the historical, textual, doctrinal, or structural modalities to advance definitional arguments, and their modality selection(s) largely depends on how they want to frame and resolve the disputed word or phrase.

Argument from Dissociation

Unlike the previous types of arguments, a more complex and therefore more difficult to recognize argument is the argument from dissociation. The law requires that Justices "reconcile conflicting claims." The argument from dissociation allows Justices to justify their rationale for finding in favor of one claim over the other by "delimiting the sphere of application" of the claim in question by "introduc[ing] distinctions" to reconcile the competing claims.[321] For example, Justices cannot resolve a 'rights' claim without considering individual rights versus societal rights, or without considering the spirit of the law versus the letter of the law that protects or excludes the 'right' in question; Justices must resolve the competing claims by demonstrating that one claim deserves precedence over the other claim.

The argument from dissociation provides a strategy for reconciling the competing claims, and the argument proceeds by dividing a previously unified concept or idea (rights) into two "philosophical pairs" (individual/societal, spirit/letter) in which

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[320] Schiappa, "Arguing about Definitions," 406-407. Also see Schiappa, "Dissociation in the Arguments of Rhetorical Theory," 74.

[321] Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 414.

one of the two "is usually considered metaphysically, epistemologically, or ethically superior to the other," or "one that will be positively valued by the target audience, and one that will be negatively valued."[322] When used as an argumentative strategy within a text, such as an opinion, the argument from dissociation is a "powerful linguistic device" that allows the advocate to reframe the issue(s) in question in an attempt to "restructur[e] a community's linguistic understanding of reality."[323] To advance an argument from dissociation, Justices can utilize the ethical or prudential modalities, since each modality addresses the at times ambiguous and often contested concepts of freedom, liberty, justice, and rights.

Institutional Argument

A final type of legal argument is the institutional argument. In many Court cases, the constitutional or legal issue(s) centers on whether an institution possesses the authority to promulgate a regulation or rule. To determine whether the institution is within or has exceeded its authority, Justices can advance an institutional argument to "define the scope of institutional decision making and explain why particular actions are justified in light of the public's interest."[324]

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[322] Schiappa, "Arguing about Definitions," 408. See Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 411-459. For more on Perelman's work, see Goodrich, "Rhetoric as Jurisprudence," 88-122, and Wiethoff, "Critical Perspectives on Perelman's Philosophy of Legal Argument," 88-95.

[323] Schiappa, "Dissociation in the Arguments of Rhetorical Theory," 74, 81. Also see Saunders, "Law as Rhetoric, Rhetoric as Argument," 576.

[324] Doxtader, "Learning Public Deliberation through the Critique of Institutional Argument," 185.

The institutional argument provides Justices with a potent tool for resolving questions concerning an institution's authority. As Professor Steve Schwarze explains, institutional arguments "function to negotiate the legitimacy of governing institutions,"[325] and when the Court determines "that a particular institution has the authority to define a term for policy purposes," the Court thereby also determines "that some part of the policy-making apparatus . . . should be accepted as the rightful definer of key terms."[326]

At the same time, institutional arguments promote judicial restraint. As Schwarze explains, institutional arguments allow the Court to "avoid the appearance of . . . legislating from the bench" since the Court is deferring to institutional regulation- and rule-making rather than imposing Court-created regulations or rules. Deferral also demonstrates that "the [C]ourt is not overstepping its bounds" by "actively intervening in agency decisionmaking [sic] or creating their own definitions of statutory terms." Perhaps the greatest value in advancing institutional arguments, however, is that Justices "can minimize the appearance of actively imposing their own policy preferences and bolster [the Court's] legitimacy."[327] To advance an institutional argument, Justices can utilize the doctrinal and structural modalities, as both address the role of institutions and their authority within the Law/law.

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[325] Schwarze, "Rhetorical Traction," 133.

[326] Schwarze, "Rhetorical Traction," 144.

[327] Schwarze, "Rhetorical Traction," 145.

Legal Argument 'Types' and Rhetorical Criticism

By no means does the above discussion identify every 'type' of legal argument judges, Justices, lawyers, or scholars use; instead, the discussion addresses and explains those argument 'types' most commonly found in judicial texts, especially Court/court opinions. At the same time, the discussion synthesizes how Justices can advance legal argument 'types' within a particular modality as part of an argumentative strategy to advance their position and to ground their rationale and reasoning for that position, which supports White's contention that "[w]hat is most needed in law . . . is not abstract theoretical argument but a more fully informed and argumentative critical practice."[328] Understanding how argument 'types' and argument modalities interrelate provides the requisite background for examining the ever-present concern regarding Supreme Court Justices: To what judicial philosophy does a Justice adhere? That question remains a central concern for those who study the Court, and the next part of the project explores this question.

Judicial Philosophies and Theory Disputes

According to legal scholar Daniel Farber, "Constitutional law needs no grand theoretical foundation. None is a likely ever to be forthcoming, and none is desirable."[329] Yet as Professor Barry Sullivan notes, there is a "current preoccupation

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[328] White later reiterates his position, saying, what is needed in law is not more theory, but more practical criticism." White, *Justice as Translation*, 98, 99.

[329] Daniel A. Farber, "Legal Pragmatism and the Constitution," *Minnesota Law Review* 72 (1988): 1332. Maltz provides a similar claim: "[T]here is no consensus on the criteria for evaluating constitutional theories." Maltz, *Rethinking Constitutional Law*, 19.

with theories of interpretation and adjudication,"[330] and Professor John Valauri deems the endless search for a Justice's constitutional theory a "method fetish."[331] Nonetheless, those most interested in how the Court rationalizes its decisions continually engage in fervent academic debates regarding the Justices and the judicial philosophy to which they adhere and which they apply when writing their opinions, for as Judge Patricia Wald notes, "[w]e write what we are, and perhaps, more than others, judges are what they write,"[332] and as law professor Daniel Breen notes, "by examining carefully what judges do say, when they say anything, it is possible to determine if they possess a consistent point of view that may help us predict how they are likely to approach major controversies as the years go on."[333]

Formalism

One of the "dominant jurisprudential mode[s]" of the nineteenth century—legal formalism—"began just after the Civil War, rose to its zenith at the turn of the century, and ended with the advent of World War II."[334] Most scholars attribute the doctrine to

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[330] Barry Sullivan, "Justice Jackson's Republic and Ours," in *Law and Democracy in the Empire of Force*, ed. H. Jefferson Powell and James Boyd White, 172-206, (Ann Arbor: The University of Michigan Press, 2009), 176.

[331] Valauri, "The Varieties of Constitutional Theory," 512.

[332] Wald, "The Rhetoric of Results and the Results of Rhetoric," 1415. Laura Krugman Ray echoes Judge Wald's claim: "[E]ven formal judicial prose can convey the personality of its author . . . judicial personality can assert itself and, at the same time, serve to express the author's jurisprudential vision." Laura Krugman Ray, "Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions," *Washington & Lee Law Review* 59 (2002): 195.

[333] Breen, "Avoiding 'Wild Blue Yonders,'" 89.

[334] Goetsch, "The Future of Legal Formalism," 221.

Harvard Law School Professor Christopher Columbus Langdell, who is "universally regarded as the father of legal formalism."[335] Langdell believed that "law consisted of scientifically identifying the relevant rules and applying them to the individual case"[336] and he saw "the task of legal theory" as the process of discovering the "principles that underlie legal doctrine."[337]

One allure of the formalist approach to constitutional interpretation lies in the simplicity of the tools needed for resolving competing claims. Justices who adhere to formalism use logic in their reasoning,[338] and they resolve cases "as technicians whose task and expertise is mechanical: to find the law, declare what it is, and apply its pre-existing prescriptions."[339] While cases raise competing claims about that which is constitutional or legal, those claims are not "new" or "novel" claims that Justices must

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[335] Patterson, "Conscience and the Constitution," 276.

[336] Thomas Michael McDonnell, "Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems," *UMKC Law Review* 67 (1998): 286.

[337] Patterson, "Conscience and the Constitution," 276. For more on the formalist approach, see Lawrence B. Solum, "Judicial Selection: Ideology versus Character," Research Paper No. 04-07, Spring 2004: 1-27. <http://ssrn.com/abstract=516585>, and Lawrence B. Solum, "The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights," *Journal of Constitutional Law* 9 (2006): 155-208.

[338] Judge Posner, for example, defines formalism as "the use of logic in legal reasoning." Posner, "Jurisprudential Responses to Legal Realism," 326.

[339] Dagan, "The Realist Conception of Law," 612. Torben Spaak offers a similar explanation: "[T]he judge [is] someone who decides the case before him in a mechanical way by applying a legal norm to the facts," and other scholars offer the same description: "[J]udges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way." See Torben Spaak, "Deduction, Legal Reasoning, and the Rule of Law," *Constitutional Commentary* 23 (2006): 106, and Guthrie, Rachlinski, and Wistrich, "Blinking on the Bench," 2.

struggle to resolve; instead, either the statutory text or prior Court precedent provides the necessary answers for resolving the questions in the instant case.[340] Along those same lines, formalists are wary of turning to legislative history or legislative intent to resolve competing claims; caution deters formalists from exercising "their discretion to make illegitimate policy choices" or "to write their own preferences into the statute."[341]

Another appeal to the formalist theory of constitutional interpretation is that it promotes judicial restraint and curbs Justices from letting their ideological biases or policy agendas influence their decision-making. As Professor Sunstein explains, a formalist approach to deciding cases "denies courts four relevant powers: to make exceptions to the text when those exceptions seem sensible or even necessary; to allow meaning to change over time; to invoke 'canons' of construction to push statutes in favored directions; and to invoke the purposes of the legislature to press otherwise unambiguous words in certain directions."[342] Formalists, therefore, can utilize the historical, structural, and doctrinal modalities to advance their claims, since each modality focuses the resolution of competing claims on the statutory text, the Constitution, and precedent and the principle of *stare decisis*.

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[340] See, for example, Wilson Huhn, "The Stages of Legal Reasoning: Formalism, Analogy, and Realism," *Villanova Law Review* 48 (2003): 309.

[341] Eskridge, Jr., "The New Textualism," 646, 648.

[342] Sunstein, "Must Formalism Be Defended Empirically?" 639.

Realism

As the formalist theory of constitutional interpretation grew, both jurists and non-jurists sought a new approach "for the observation, description, and criticism of law," an approach that better described the judicial practice,[343] and in the latter part of the nineteenth century, a movement began that functioned "as an attack on formalism."[344] Known as the realist movement, proponents of this approach "abandoned" the formulaic method for resolving cases and rejected the view that defined "the Constitution in static terms as a code of law."[345]

Most legal realists agree that the movement began with Massachusetts Supreme Court Justice Oliver Wendell Holmes's influential address, "The Path of the Law," in 1897.[346] Holmes "insisted that the law was a great anthropological document," an idea in which the law was not limited only to the rules that dictated citizens' behaviors, but instead took into consideration the "compelling personal accounts of how citizens live

[343] Linde, "Judges, Critics, and the Realist Tradition," 228. As Dagan notes, "The starting point of legal realism is its critique of formalism." Dagan, "The Realist Conception of Law," 611.

[344] Hunter, "Reason is too Large," 1225, footnote 96.

[345] Belz, *A Living Constitution or Fundamental Law?* 57.

[346] Holmes, of the Supreme Judicial Court of Massachusetts, as it was called then, delivered an address at the dedication of the new hall of Boston University School of Law on January 8, 1897. His address was published that same year. See Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457-478. Green, however, states that Holmes "predated the legal realist movement." See Green, "Legal Realism as a Theory of Law," 1936. According to Michael Golding, one of Holmes' "major contributions to legal philosophy, in fact, is that judicial decision making frequently involves value judgments." Martin P. Golding, *Philosophy of Law* (Englewood Cliffs, NJ: Prentice-Hall, Inc, 1975), 37.

and work."[347] Holmes' idea represented a significant departure from the existing views about the law, and he recognized that the law encompassed more than what "the musty textbooks of the formalists" described.[348]

In the late 1920s and early 1930s, however, legal scholars began voicing their criticism against this new "school" of legal theory, to which Columbia Law School Professor Karl Llewellyn offered a lengthy reply in 1931. Llewellyn wrote that "[t]here is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed. . . . There is, however, a *movement* in thought and work about law."[349] After discounting the criticisms, Llewellyn explained that realists rejected the exclusively logic-centered approach to adjudication as well as the belief that judges functioned as technicians who resolved competing claims in a mechanical manner. According to Llewellyn, the realists harbored "[d]istrust of traditional legal rules and concepts in so far as they purport to *describe* what either courts or people are actually doing" and "a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions."[350] More important, Llewellyn outlined realism's basic

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[347] Silbey, "The Dream of a Social Science," 786.

[348] Hasian, Jr., "Vernacular Legal Discourse," 92.

[349] Llewellyn, "Some Realism about Realism," 1233-1234. Italics in original. In addition to Llewellyn's essay, William Twining notes that the primary 'realist' scholarship written in response to the 'formalist' view of the law occurred "on a broad view not earlier that 1870, and not much later than 1960; on a narrower, more manageable, view mainly between 1900 and 1940." See Twining, "Talk about Realism," 341.

[350] Karl N. Llewellyn, "Some Realism about Realism," 1237. Italics in original.

tenets, which included, in part, conceiving of the "law as a means to social ends and not as an end in itself," which required constantly reevaluating the law "for its purpose, and for its effect;" recognizing that society continually changes and therefore "any portion of law needs reëxamination [sic] to determine how far it fits the society it purports to serve;" and, "[a]n insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness [sic] of trying to find these effects."[351] As a result of his poignant essay and strident defense of realism, "Llewellyn is entitled to be regarded as the man most representative of the movement as a whole."[352]

While scholars cannot say with certainty that Llewellyn's essay saved legal realism from its critics, the fact remains that "legal realism gained a strong following within the nation's leading law schools during the 1930s."[353] Future jurists embraced realism, such as Second Circuit Court Judge Jerome Frank[354] and Justice Benjamin Cardozo, whom some scholars identify as "the premier Realist judge."[355] Legal realism, in fact, is "still taught if not always endorsed in laws schools today."[356]

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[351] Karl N. Llewellyn, "Some Realism about Realism," 1236-1237.

[352] Fuller, "American Legal Realism," 430.

[353] George and Epstein, "On the Nature of Supreme Court Decision Making," 324.

[354] Clayton, "The Supreme Court and Political Jurisprudence," 15-41. Judge Posner adds Justice William Douglas to this list. See Richard A. Posner, "What Has Pragmatism to Offer Law?" *Southern California Law Review* 63 (1990): 1654.

[355] Fischer, III, Horwitz, and Reed, *American Legal Realism*, 3.

[356] Jess Bravin, "Legal Realism Informs Judge's Views," *Wall Street Journal*, May 28, 2009, A3. Two scholars note, though, that "the realism of Frank and Llewellyn was more sophisticated than the retro-realism we see in law schools today." Brigham and Harrington, "Realism in the Authority of Law," 22.

The realist approach to constitutional interpretation largely remains true to the tenets of which Llewellyn wrote. While scholars do not agree on the exact precepts that comprise realism,[357] most scholars do agree on the primary view of the law that realist thinkers and writers hold, two of which are noteworthy.

Unlike the formalists, who believe judges should follow precedent and adhere to the principle of *stare decisis*, realists deny that either controls a judge's decision-making. The simple explanation for this denial is that "[n]o two cases . . . are ever exactly alike;"[358] the more difficult explanation is that realists recognize that judges make the law.[359] Legal reasoning is not a deductive, logic-centered method; instead, for the realist judge the legal reasoning process is "an intuitive process,"[360] and the law "is not contained in codes, cases, or regulations; law is what officials of the law do when faced with a dispute, nothing more."[361] Put simply, judges who adhere to the realist philosophy of constitutional interpretation resolve cases according to their predispositions,[362] "their

[357] For example, Twining identifies "at least five different perspectives on Realism" in which realism is viewed as "1. A distinctive theory of or about law; 2. A theory of adjudication; 3. A negative or nihilistic critique of formalism; 4. A constructive search for alternatives to Langdellism; and, 5. Various political or ideological interpretations." See Twining, "Talk about Realism," 343.

[358] Derrick A. Bell, Jr., "Racial Realism," in *The Legal Studies Reader: A Conversation & Readings about Law*, ed. George Wright and Maria Stalzer Wyant Cuzzo, 245-253 (New York: Peter Lang, 2004), 246.

[359] See, for example, Hample, "Motives in Law," 156.

[360] Guthrie, Rachlinski, and Wistrich, "Blinking on the Bench," 2.

[361] Mc Donnell, "Playing Beyond the Rules," 286.

[362] Patrick J. Borchers, "Conflicts Pragmatism," *Albany Law Review* 56 (1993): 893.

ideological impulses," or their "ideological policy ends"[363]—and "the judicial process would be improved if all understood that this is what really goes on."[364] With the recognition that realist judges shape the law to fit their aims for the law, they can must adjust the components of the modalities to advance their claims, since the realist approach acknowledges that judges exercise judicial activism to resolve competing claims.

Some scholars discredit realism on the grounds that it "undercut[s] the authority of the text" by suggesting that one cannot discern meaning from the written text.[365] Others criticize the cynicism of the model.[366] Kronman suggests that if "every adjudication at its heart is an exercise of unrestrained will" by judges, "then it is difficult to know how one can either explain past judicial behavior or predict its future course." Additionally, according to Kronman, judges who "make decisions in an arbitrary way" undermine a critic's efforts "for justifying their [the judges'] decisions or criticizing them."[367]

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[363] Frank B. Cross and Blake J. Nelson, "Strategic Institutional Effects on Supreme Court Decisionmaking," *Northwestern University Law Review* 95 (2001): 1441.

[364] Borchers, "Conflicts Pragmatism," 893. As Bruce McLeod notes, "judicial discretion becomes" the "exercise of personal, social, and political values." McLeod, "Rules and Rhetoric," 312.

[365] Brigham, "The Upper Courts," 17.

[366] Guthrie, Rachlinski, and Wistrich, "Blinking on the Bench," 2.

[367] Anthony Kronman, "Jurisprudential Responses to Legal Realism," *Cornell Law Review* 73 (1988): 336.

Positivism

In 1953, former barrister and philosopher H.L.A. Hart accepted a professor of jurisprudence position at Oxford University, where he began developing his philosophy of legal positivism. Hart rejected the realists' claims that judges 'make the law;' instead, Hart sought to prove that a legal system depended upon the stability and the predictability of the law, and that the meanings or interpretations of words, such as "right" or "duty," did not exist independent of the context in which they were used. Hart's primary concern with the law, therefore, entailed justifying the validity of the law and clarifying how the ambiguity and ever-changing definitions and meanings of words impacted the law.

In a break from the realists' beliefs, Hart's legal positivism theory argued that any case could "be controlled by an existing legal rule,"[368] which he identified as "the rule of recognition."[369] According to Hart, primary and secondary rules comprised the legal system and thereby produced "the rule of recognition." Primary rules specify how people "ought to act:" what they are allowed or forbidden to do, what recourse they have against one another or their government, or what 'rights' they possess; secondary rules specify how the primary rules come into existence: how rules are created, how rules are nullified, or how rules are applied. For Hart, the validity (i.e. legality) of a (primary) rule depended upon the validity of the criteria (secondary rule) used for adopting that rule; only when a valid system exists for creating, nullifying, or applying rules does a valid

[368] Borchers, "Conflicts Pragmatism," 890.

[369] Stephen R. Perry, "The Varieties of Legal Positivism," *Canadian Journal of Law and Jurisprudence* 9 (1996): 362.

law—a "rule of recognition"—exist.[370] Judges, then, promote the stability and predictability of the legal system when they recognize that a "rule of recognition" exists for resolving the instant case before them.[371]

Hart also attempts to answer three claims about the law: first, the realists' claim that judges can manipulate the definitions and meanings of words to make the law fit their preconceived notions; second, the utilitarian claim that law must be moral; and, third, the formalist conception of the judge as a technician. To refute these three theories, Hart introduces what he terms the "problems of the penumbra," a condition that exists in which there are unclear rules about how a law should apply. In a lengthy excerpt centered on the term 'vehicle,' Hart provides an example to illustrate the tensions:

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use - like "vehicle" in the case I consider - must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. . . . We may call the problems which arise outside the hard core of standard instances or settled meaning "problems of the penumbra"; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the

[370] I base my discussion on a somewhat crude, but hopefully accurate, summarization of what I consider one of the best articles on Harts philosophy. See Robert S. Gerstein, "Hart's Positivism [review essay]," *American Bar Foundation Research Journal* 1985 (1985): 629-638.

[371] Also see Teitelbaum and McCormack, "A Simplified Introduction to Legal Argument," 36. As they explain, positivists hold that "the role of courts is to discover how existing law applies to a particular dispute brought before it for resolution."

> multidimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. So if it is rational or "sound" to argue and to decide that for the purposes of this rule an airplane is not a vehicle, this argument must be sound or rational without being logically conclusive. What is it then that makes such decisions correct or at least better than alternative decisions? Again, it seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be; it is easy to slide from that into saying that it must be a moral judgment about what law ought to be case. . . . This restatement of the point would have the following consequence: instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it.[372]

Hart's focus on the term 'vehicle' allows him to evaluate the strengths of his positivist approach for promoting stability and predictability in the law. The list of myriad vehicles demonstrates that the realists' flexibility with words fails to resolve the instant case, and allowing judges to make the law fails to promote the stability or predictability of the law. Invoking a claim of morality or immorality fails to resolve the conflict over what vehicle the rule/law allows or prohibits; morality and immorality are independent of a law's validity.[373] The facts of the case negate the logic-centered, formulaic approach for

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[372] Hart, "Positivism and the Separation of Law and Morals," 607-608, 612.

[373] See Gerstein, "Hart's Positivism," 630, and Schauer, "Constitutional Positivism," 801. As Schauer notes, "law may very well be moral, and certainly *should* be moral, but it is not *necessarily* moral." Italics in original.

resolving the law-created conflict. For Hart, the resolution of the instant case begins with "the rule of recognition," proceeds by an assessment of how the term is used within the context of the relevant law, and in the absence of a clear solution, judges must discern from the statutory text and the secondary rules the intended application of the rule/law.

While positivism as a theory of constitutional interpretation does not provide a panacea for resolving competing claims, the positivist approach "continues to dominate legal education in the United States,"[374] and "positivism has been the dominant approach to legal studies for the past two centuries."[375] While some critics fault the theory for allowing judges to avoid "resorting to complex, deliberative, and evaluative forms of reasoning" and ignore the "practices of argumentation" that take place in decision-making,[376] others welcome the approach since it acts "as a buffer for judges against the criticism that they create legal rules to justify results that they want to reach in particular cases for undisclosed reasons."[377] The structural and doctrinal modalities, which encourage judges to turn to the Constitution and prior case law (which provides the basis for "the rule of recognition"), encourage positivist judges to resolve competing claims in a manner that promotes the stability and predictability of the law.

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[374] George and Epstein, "On the Nature of Supreme Court Decision Making," 324.

[375] Bertea, "Certainty, Reasonableness and Argumentation in Law," 467.

[376] Bertea, "Certainty, Reasonableness and Argumentation in Law," 470.

[377] Teitelbaum and McCormack, "A Simplified Introduction to Legal Argument," 36.

Pragmatism

Another leading theory of constitutional interpretation, one that "has been the dominant philosophy in the United States," is pragmatism.[378] Attributed to Charles Sanders Peirce, a nineteenth century American philosopher, pragmatism counts among its earliest followers Harvard Law School Professor Roscoe Pound and Oliver Wendell Holmes, whom the realists claim in their camp, even though some scholars argue that Holmes practiced legal pragmatism,[379] and to support their adoption they note that Holmes "mocked the notion of natural rights and held that the very meaning of the Constitution, not just its application to particular cases, needs to be adapted to fit the most 'advanced' thinking of the times."[380] Pragmatists also cite Supreme Court Justices "Brandeis, Frankfurter, Jackson, Douglas, Brennan, Powell, Stevens, White, and now Breyer" as jurists who adhere to the pragmatist philosophy of constitutional interpretation.[381]

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[378] Rosenfeld, "Pragmatism, Pluralism and Legal Interpretation," 99.

[379] See Thomas C. Grey, "Holmes and Legal Pragmatism," *Stanford Law Review* 41 (1989): 787-870; "Holmes, Peirce and Legal Pragmatism," 1123-1140; and, Scallen, "Classical Rhetoric, Practical Reasoning, and the Law of Evidence," 1733, footnote 118. Posner argues, however, that "Holmes would have shunned the pragmatist label and was by no means a consistent pragmatist." See Posner, *Cardozo: A Study in Reputation*, 28. Steven Smith, however, notes that "current legal pragmatists commonly regard [Holmes] as a kind of patron saint for the movement." Steven D. Smith, "The Pursuit of Pragmatism," *Yale Law Journal* 100 (1990): 413-414.

[380] David Lewis Schaefer, "When It Comes to Judges, 'Pragmatic' Means Unprincipled," *Wall Street Journal*, May 9-10, 2009, A13.

[381] Posner, "Pragmatic Adjudication," 2.

While many respected jurists and non-jurists follow the pragmatist philosophy, as Professor Scallen notes, "[p]ragmatism is almost as difficult to define as rhetoric."[382] Judge Richard Posner, a leading advocate of pragmatism, defines the theory as "an avowal of skepticism about various kinds of theorizing,"[383] and he argues that pragmatism is "more fundamentally the rejection of a sharp line between truth and rhetoric, between the analytic and the persuasive, the discursive and the metaphoric."[384] Posner's definition, though, does little to clarify the major components of this "dominant" theory. A more accurate conception of pragmatism recognizes that the theory involves "the rejection of foundationalist theories of truth and knowledge."[385]

As its major premise, pragmatism serves as a critique of formalism.[386] Whereas formalists hold that precedent and the principle of *stare decisis* should guide judges'

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[382] Scallen, "Classical Rhetoric, Practical Reasoning, and the Law of Evidence," 1733. Morgan Cloud echoes Scallen's claim: "Legal pragmatism has not been, and cannot be, defined precisely in a single maxim. Disagreement even exists about the appropriate label for the body of ideas comprising pragmatist theory." Morgan Cloud, "Pragmatism, Positivism, and Principles in Fourth Amendment Theory," *UCLA Law Review* 41 (1993): 208.

[383] Posner, "Against Constitutional Theory," 223.

[384] Posner, *Cardozo: A Study in Reputation*, 136.

[385] Scallen, "Classical Rhetoric, Practical Reasoning, and the Law of Evidence," 1734. Andrew Morris offers a similar assessment: "Pragmatist judges . . . acknowledge no obligation to give case law any force at all, and grant it force only if its substance is attractive. They grant no force to legal form." Andrew J. Morris, "Some Challenges for Legal Pragmatism: A Closer Look at Legal Pragmatism," *Northern Illinois University Law Review* 28 (2007): 2.

[386] See, for example, Grey, "Freestanding Legal Pragmatism," 27. Morris offers a similar account: "[P]ragmatists tend to cast almost any regard for legal form as tantamount to strong formalism: as deciding cases based on relations among concepts with insufficient regard for the world of fact." Morris, "Some Challenges for Legal Pragmatism," 13. Also see Posner, "What Has Pragmatism to Offer Law?" 1654. According to Judge Posner, "Pragmatism remains a powerful antidote to formalism, which is enjoying a resurgence in the Supreme Court" (p. 1663).

decision-making, "the pragmatist considers precedent relevant only to the extent it is useful" and believes "analogy cannot usefully constrain, or even justify, judicial decisions;"[387] instead, pragmatism holds that judges can, and should, solve "legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy."[388] As Judge Posner explains, "the pragmatist judge . . . wants to come up with the best decision having in mind present and future needs," and therefore pragmatists view precedent not as "an end in itself but only as a means for bringing about the best results in the present case."[389]

At the same time, pragmatism incorporates components from other legal theories as well. Like the realists, the pragmatists recognize that judges "have somewhat inchoate biases and respond to diverse factors that influence particular decisions."[390] Pragmatists also attempt to balance the validity of law with the morality of law. As Professor Daniel Farber explains, the pragmatic approach to resolving the instant case begins, but does not end, "with an examination of our constitutional text, history, and traditions." During the process of resolving competing claims, the pragmatist also evaluates, for example, "whether the idea of fundamental rights works, whether it produces better results for society," and therefore the pragmatist judge "tries to analyze problems based on both

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[387] Morris, "Some Challenges for Legal Pragmatism," 14.

[388] Farber, "Legal Pragmatism and the Constitution," 1332.

[389] Posner, "Pragmatic Adjudication," 5. As Smith notes, "to promote predictability and consistency in the law," pragmatist judges "would likely tend to follow precedent and to respect legislation." Smith, "The Pursuit of Pragmatism," 414.

[390] Gottlieb, *Morality Imposed*, xiii.

social policy and traditional legal doctrines, seeking a satisfactory adjustment of the two."[391] Such an approach to constitutional law, Farber argues, encourages better decision-making: "pragmatism responds to our sense that some constitutional problems are simply *hard* and unresponsive to any preset formula," and pragmatism "does prompt a healthy concern about the societal impact of law."[392] A pragmatist judge, therefore, can utilize all of the argument modalities in an effort balance the Constitution and laws with the needs of society.

Criticisms of the pragmatist theory echo those leveled against many of the other theories. Professor David Schaefer, for example, describes pragmatism as "a willingness to disregard the rule of law, the democratic process, and the Constitutional text in favor of judges' own idiosyncratic notions of fairness."[393] Judge Posner concedes that "[t]he greatest danger of judicial pragmatism is intellectual laziness," where judges choose "to react to a case rather than to analyze it,"[394] and Farber notes that for many critics, the pragmatist approach "leads to unprincipled and inconsistent judicial decisions."[395] Nonetheless, like positivism, pragmatism remains one of the leading judicial philosophies among the nation's judges and Justices.

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[391] Farber, "Legal Pragmatism and the Constitution," 1350, 1353, and 1377.

[392] Farber, "Legal Pragmatism and the Constitution," 1342-43. Also see Luban, "What's Pragmatic about Legal Pragmatism?" 43-73.

[393] Schaefer, "When It Comes to Judges, 'Pragmatic' Means Unprincipled," A13.

[394] Posner, "Pragmatic Adjudication," 16.

[395] Farber, "Legal Pragmatism and the Constitution," 1343.

Originalism

Perhaps the most contentious of all the constitutional theories of interpretation is originalism, which is a formalist-type theory. As discussed earlier in the chapter, those who adhere to an originalist philosophy approach to constitutional interpretation are known as either 'original intent' or 'original meaning' theorists.[396] Original intent theorists believe that "constitutional meaning is determined by reference to the Constitution's text as illuminated by the intent or understanding of its drafters and ratifiers;"[397] original meaning theorists hold that "constitutional provisions should not be interpreted in light of their modern consequence, but rather in light of their ratified meaning, with words being interpreted in reference to their understanding at the time of ratification rather than the specific intent of any particular drafter."[398] Judges who follow the original meaning approach, which some call "textualism or literalism"[399] or "a 'plain

[396] For further clarification of the two forms, see Barnett, *Restoring the Lost Constitution*, 89-94.

[397] Saphire, "Enough about Originalism," 516. Also see Farber, "The Originalism Debate," 1085-1106 and Maltz, "Foreword: The Appeal of Originalism," 773-805. As Whittington notes, "originalists tend to use 'original intent' and 'written constitution' or the 'text of the Constitution' as if they were interchangeable terms." Whittington, *Constitutional Interpretation*, 47.

[398] Douglas W. Kmiec, "Of Judicial Methods and Judicial Integrity: Has Originalism Struck Out?" *PREVIEW of United States Supreme Court Cases* 35 (2008): 390.

[399] Valauri, "The Varieties of Constitutional Theory," 501. As Valauri notes, "Textualism may be held as an independent theory of constitutional interpretation; it may also be supplemented by other theories." (p.501-502).

meaning' or 'textualist' theory of interpretation,"[400] involves that practice about which Justice Owen Roberts wrote in his 1936 *United States* v. *Butler* majority opinion:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.[401]

Those who advocate that judges follow the doctrine of originalism argue that so doing promotes better decision-making, as judges interpret and defend the Constitution as it was entrusted to them. The Constitution lays out directives and principles which judges should use to resolve competing claims;[402] relying on either the original intent or original meaning of the Constitution can resolve statutory questions;[403] and, judges will not "overgeneralize nor undergeneralize [sic]" questions about the meaning of a word if they rely on the Constitution to answer the question posed.[404] Along those same lines, Professor Jack Balkin suggests that advocates for an originalist philosophy should avoid opposing those who are "nonorginalists," or those who believe in a 'living Constitution;'

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[400] Post, "Theories of Constitutional Interpretation," 14. For a comparison and contrast of intentionalism and textualism, see Michael Moore, "Originalist Theories of Constitutional Interpretation," *Cornell Law Review* 73 (1988): 364-370. For a study using a qualitative analysis of judicial opinions, see Gates and Phelps, "Intentionalism in Constitutional Opinions," 245-261.

[401] *United States* v. *Butler*, 297 U.S. 1 (1936): 62.

[402] See, for example, Perry, *The Constitution in the Courts*, 39, and Gottlieb, "The Rehnquist Court (1986-[2005]), 331.

[403] See Maltz, *Rethinking Constitutional Law*, 64.

[404] Perry, *The Constitution in the Courts*, 42.

creating a demarcation undermines the value of the originalist approach. As Balkin explains,

> Constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles stated by the text or that underlie the text. Constitutional interpretation also requires *construction*—deciding how best to implement and apply the constitutional text and principles in current circumstances. This is the method of *text and principle.* It is faithful to the original meaning of the constitutional text and its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles.[405]

Balkin believes his originalist interpretation to constitutional interpretation provides a healthy balance, as it allows judges to "draw on a rich tradition of sources that guide and constrain interpretation, including pre- and post-enactment history, original expected application, previous constitutional constructions, structural and intertextual arguments, and judicial and nonjudicial precedents."[406] Whether judges follow original intent, original meaning, or Balkin's balancing approach, those judges will utilize the historical, textual, structural, and doctrinal modalities.

Those who oppose the originalist approach to constitutional interpretation offer what are, to many, compelling reasons to reject the doctrine. Many view the Constitution as "a flexible document,"[407] one which Justices must adapt as society changes. Others believe that discerning original meaning is an illusory quest because "the language of the

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[405] Jack M. Balkin, "Fidelity to Text and Principle," In *The Constitution in 2020*, ed. Jack M. Balkin and Reva B. Siegel, 11-24 (New York: Oxford University Press, 2009), 11.

[406] Balkin, "Fidelity to Text and Principle," 19-20.

[407] Derek Davis, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations* (Buffalo, N.Y.: Prometheus Books, 1991), 43.

document cannot realistically or reasonably, in a categorical sense, be frozen in its eighteenth-century meaning."[408] Advocating an original intent approach is equally fruitless, since "[o]riginal intent is often difficult to ascertain because of blanks in the historical record (particularly concerning the views of the ratifiers of constitutional provisions), the divergent views of decision-makers, and the usual difficulties of interpreting any text (particularly texts of ancient vintage). . . . None of these arguments individually is devastating, but cumulatively they make the originalist project dubious."[409] Most damning, for many, is that those Justices who adhere to any form of originalism commit *the* cardinal sin: "When the text has not been helpful . . . [Justices] abandon the text and history and resort to the 'spirit' of the Constitution."[410] As Professor Randy Barnett notes, however, "despite the onslaught of criticism . . . [originalism] may be the dominant method actually used by constitutional scholars—even by those who disclaim originalism."[411]

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[408] Belz, *A Living Constitution or Fundamental Law?* 35.

[409] Farber, "Legal Pragmatism and the Constitution," 1338-1339. Maltz includes opponents of originalism as those who follow the "[Paul] Brest school" of nonoriginalism, and Maltz identifies similar arguments against the originalist claims. According to Maltz, there is first "the difficulty of interpreting the historical record" which "is never absolutely complete and is often fraught with ambiguities," and second, discerning "original understanding" is problematic since each 'Framer' or 'Founding Father' may have held "a different perception of a constitutional provision." Hence, any reference to "original understanding" fails to "tell the judge which of many understandings should prevail." See Maltz, *Rethinking Constitutional Law*, 21-22.

[410] Stephen E. Gottlieb, "The Rehnquist Court (1986-[2005]), 334-335.

[411] Barnett, *Restoring the Lost Constitution*, 91.

Dworkinism

Professor Ronald Dworkin's legal theory, aptly termed "Dworkinism," best can be described as a response to most previously constructed and currently held philosophical traditions.[412] Dworkin advocates a "broader form of judicial activism" and he "argues that the Court has a greater competence for discerning constitutional principles, and thus for protecting rights,"[413] a seemingly reformed-realist position. He departs from the pragmatists since he "argues that the law is best seen as an interpretive activity rather than a set of social rules."[414] He "rejects" originalism "because it makes the Framers' mental state decisive in reading the abstract language of the Constitution."[415]

Ironically, Dworkin's theory refutes the judicial philosophy of the man whom he replaced at Oxford University in 1969, H.L.A. Hart. In fact, one scholar describes "Dworkin's major jurisprudential concern" as an "attack" against Hart's legal positivism,[416] and another argues that Dworkin's theory is "one of the most forceful

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[412] For Dworkin's theory, see Dworkin, *A Matter of Principle* and Dworkin, *Law's Empire*.

[413] Burgess, "Beyond Instrumental Politics," 456.

[414] Klinger, "Rhetoric's Wide-Angle Lenses," 359.

[415] Belz, *A Living Constitution or Fundamental Law?* 211.

[416] Dennis Goldford, "Interpretation and the Social Reality of Law," *Social Epistemology* 5 (1991): 11.

challenges to legal positivism in the last thirty years."[417] Therefore, most scholars view Dworkin's work as an anti-positivist response.[418]

Dworkin's "attack" begins with one of the basic tenets of the positivist theory. As with positivism, Dworkin agrees that in some areas of the law there are "hard cases," or those cases "at the (thin) margins" in which "a consensus of informed opinion on the application of the law" does not exist;[419] in such cases, the "rules are unclear" and therefore the competing claims are not easily resolved.[420] His agreement with the positivists, though, ends there. Whereas positivism holds that law should be free of moral concerns, for Dworkin "law *always* has a moral component,"[421] and a moral component of the law must exist since "high-level principles or moral values animate the law."[422] To resolve the hard cases, Dworkinism "defend[s] an expansive role" for judges, since they must base their decisions on certain moral principles, such as justice and

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[417] James R. Murray, "The Role of Analogy in Legal Reasoning," *UCLA Law Review* 29 (1982): 859.

[418] See, for example, Soper, "Legal Theory and the Obligation of the Judge," 473-519. One scholar describes Dworkin as one of "the most thoughtful of the fundamental rights theorists." Whittington, *Constitutional Interpretation*, 27. Other legal scholars "identify Dworkin's view as realist." As Patterson explains, "Dworkin's continuous appeals to what the law '*really'* requires place him squarely in the realist tradition of thought." See Patterson, "Conscience and the Constitution," 282, footnotes 44 and 45.

[419] Whittington, *Constitutional Interpretation*, 41. H.L.A. Hart, for example, refers to resolving "hard cases" as the "problems of the penumbra." See Hart, "Positivism and the Separation of Law and Morals," 607.

[420] Feldman, "The Rule of Law or the Rule of Politics?" 98.

[421] Perry, "The Varieties of Legal Positivism," 363. Italics in original.

[422] Feldman, "The Rule of Law or the Rule of Politics?" 98. Solove explains that for Dworkin, "law consists of principles, which are abstract moral standards of differing weights and directions." Solove, "Postures of Judging," 174.

fairness, to resolve the conflicting claims.[423] MacCormick explains this basic precept of Dworkin's theory:

> The proper task of . . . courts of law, is to ascertain and vindicate rights . . . that are grounded in the political principles best geared to justifying the community's institutions, whether or not these principles happen to be at any given moment concretized in explicitly formulated rules of statute or case law.[424]

Dworkinism thus offers an explanation for how "judges search for principles which will fill the gaps between legal rules and particular situations,"[425] thereby resolving the "hard cases" within the law.

Resolving the hard cases by turning to moral principles promotes what Dworkin refers to as "law as integrity,"[426] and his approach to constitutional and legal interpretation proceeds in three steps. The first step, the 'preinterpretive stage,' involves a judge's determination of "what counts as evidence to the audience in terms of the particular decision being rendered." The second, or the 'interpretive' stage, entails finding "a value judgment that shows the practice of law at its best." During this stage, "a judge frames the opinion and establishes the value hierarchy to which the legal materials gathered in the interpretive stage will be applied. Here judges may mold the facts to support the value hierarchy being advanced by their opinions." The final stage is

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[423] Robert P. George, *In Defense of Natural Law* (New York: Oxford University Press, 1999), 110.

[424] MacCormick, *Rhetoric and the Rule of Law*, 119.

[425] Solove, "Postures of Judging," 174.

[426] Solove, "Postures of Judging," 177. For a concise summary, see Peter C. Schanck, "The Only Game in Town: Contemporary Interpretive Theory, Statutory Construction, and Legislative Histories," *Law Library Journal* 82 (1990): 452-453.

the 'postinterpretive' or the 'reforming' stage. During this stage judges "adjust their conception" of the necessary requirements of the law to support their justification they advanced in the interpretive stage.[427]

An additional way in which Dworkinism departs from the traditional legal theories, and promotes the "law as integrity," is the manner in which Dwokinism treats precedent. Known as the "chain novel hypothesis,"[428] Dworkinism's approach to handling precedent is similar to a group of authors writing sequential chapters in a novel: an author writes the first chapter; the second author adds a chapter that builds upon the previously written chapter, but that author has the discretion to shape her part of the story to make it fit with the previous chapter; then another author, who also possesses the discretion to shape his part of the story, writes a chapter; and the process continues in which separate authors add individual chapters that comprise the complete novel. The development of precedent proceeds in the same way: the first chapter in the story is the constitutional or legal issue(s) in a case; the second chapter is the initial story of the resolution of that first case; and, each subsequent decision on a similar case should be seen as an individual chapter in the ongoing process of "writing" the Law/law, as each decision brings with it the author's/Court's discretion to shape the chapter while building upon the previous chapter. Precedent and the principle of *stare decisis* can constrain judges, but judges possess the discretion to treat both as best serves their "writing" of the Law/law. As two leading legal scholars who study the chain novel hypothesis note,

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[427] See Balter, "The Search for Grounds in Legal Argumentation," 385-386.

[428] Lindquist and Cross, "Empirically Testing Dworkin's Chain Novel Theory," 1167.

while it "is obviously an imperfect metaphor for sequential judging" and even though the "metaphor for precedent has been amply criticized, no one has yet proposed a superior model."[429]

As one could expect with such a sharp departure from the prominent legal theories, many legal scholars find fault with Dworkin's work.[430] One critic explains "that Dworkin's most important theoretical claims . . . are by and large rejected by the legal community,"[431] while another argues that Dworkin's theory "often requires judges to make highly controversial decisions that have no roots either in popular morality or in the understanding of the authors of the black-letter law which judges are pledged to interpret."[432] Most disconcerting for those who support the idea of a restrained judiciary, as another scholar suggests, Dworkin's theory promotes judicial activism since "the very reality of moral principles frees Dworkin from reliance on the constitutional text."[433]

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[429] Lindquist and Cross, "Empirically Testing Dworkin's Chain Novel Theory," 1169, 1203. Also see Fish, *Doing What Comes Naturally*, specifically chapter 16, "Still Wrong After All These Years," 356-371.

[430] According to Robin West, for example, "Dworkin's seminal account of the nature of legal argument has been so thoroughly challenged that it is questionable whether it can be fairly called the dominant conception." West, "Taking Moral Argument Seriously," 500. Also see Posner, "Conceptions of Legal 'Theory,'" 377-388, and Sunstein, "From Theory to Practice," 389-404.

[431] Raban, "Dworkin's `Best Light' Requirement and the Proper Methodology of Legal Theory," 243.

[432] Robert Westmoreland, "Dworkin and Legal Pragmatism," *Oxford Journal of Legal Studies* 11 (1991): 174.

[433] Whittington, *Constitutional Interpretation*, 27.

Prudentialism

Judge Henry J. Friendly, according to Daniel Breen, holds a "place in the select pantheon of judges," and though never a Justice of the Court, Judge Friendly remains one of the most frequently cited judges in the Justices' opinions.[434] Both an academic (a Ph.D. in History) and a legal scholar (a J.D.), Breen studied the primary texts written by Friendly as well as secondary literature about Friendly, and Breen advances what he terms a "prudentialist conception" of constitutional interpretation which he bases on Friendly's jurisprudential practice and vision. Breen provides a clear description of the judge who follows a prudentialist philosophy:

> [T]he prudentialist judge will consistently display the following characteristics: respect for precedent and constitutional text as limits upon judicial authority; deference to the decisions of other branches of government; a sensitivity to the effects judicial decisions may have upon the ability of the other branches to perform the tasks entrusted to them by law and tradition; and a determination to take faithfully into account the historic beliefs of the community in defining the extent of individual rights.[435]

Breen discusses each of the characteristics of a prudentialist judge in greater detail. A prudentialist judge "will not lightly overturn established precedents, especially those that have enjoyed wide acceptance in the greater community." Consequently, the prudentialist judge "has a limited view of the breadth of judicial authority," and the prudentialist judge avoids "[b]old forays into policy-making" and instead exercises "modesty and humility," especially with respect to the separation of powers and in being

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[434] Breen, "Avoiding 'Wild Blue Yonders,'" 75. Breen also notes that Judge Friendly "is commonly listed along with Learned Hand in the ranks of the greatest judges never appointed to the Supreme Court."

[435] Breen, "Avoiding 'Wild Blue Yonders,'" 88.

"guided by history, precedent and constitutional text." According to Breen, "[t]he most vital hallmark of a prudentialist judge is the acute recognition" that other actors within the structure of America's governmental system, in carrying out the tasks and duties accorded to them by established law and tradition, cannot effectively perform their duties if hampered or hamstrung by regulations or laws that inhibit their abilities to perform their tasks and duties. Therefore, the prudential judge recognizes that, like the judicial branch, "other institutions have equally legitimate roles to play" and therefore the prudentialist judge avoids "grand pronouncements of principle" and instead renders "decisions that other institutional actors can follow without compromising their abilities to function properly and effectively." In a related vein, therefore, the prudentialist judge "believes that there is no such thing as absolute personal rights;" instead, "individual rights must sometimes be balanced against other legitimate social and institutional interests."[436]

For Breen, the prudentialist philosophy incorporates the best components from the existing theories of constitutional interpretation. Precedent and the principle of *stare decisis*, concern for the validity of law, judicial discretion and restraint, recognition of the importance that the separation of powers doctrine plays in both the governmental and legal system, and a concern for the proper balance of rights all factor into a prudentialist judge's decision-making. Prudentialist judges, therefore, can utilize any of the modalities in their decision-making and resolution of the instant case.

[436] Breen, "Avoiding 'Wild Blue Yonders,'" 86-88.

Judicial Philosophies and Rhetorical Criticism

As the competing theories of constitutional interpretation and their components reflect, discerning an individual Justice's judicial philosophy poses a formidable challenge. A close-reading of a variety of legal writings and opinions from that Justice, though, may offer insight into whether that Justice adheres to one or more philosophies. Discovering the 'types' of legal arguments the Justice advances within a particular modality, and then assessing how that modality fits within a philosophy, allows the critic to evaluate how that argumentative or rhetorical strategy functions within the text. Hopefully, the endeavor to unite legal argument, argument modalities, and judicial philosophies will offer a compelling approach for studying judicial opinions, as well as demonstrate that scholars can embrace legal rhetoric and rhetorical criticism as integral parts of an interdisciplinary approach to the study of the Law/law.

CHAPTER III

IN TRAINING FOR THE "BIG SHOW": ROBERTS' SERVICE IN THE REAGAN AND BUSH I ADMINISTRATIONS

Roberts' Legal and Political Career

John Roberts' immersion into the judicial world began shortly after his graduation from Harvard Law School in 1979. A *magna cum laude* graduate, Roberts' sterling law school standing earned him a clerkship with Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit. Roberts' work ethic and success with Judge Friendly caught the attention of Justice William H. Rehnquist, and in 1980 Roberts accepted a clerkship with the Associate Justice.[437] Clerking for two of the most respected jurists in the country earned Roberts a reputation as a sharp and legally savvy attorney, and that reputation thrust Roberts from the judicial world in the world of politics.

Rather than entering a corporate or private legal practice after his clerkships, Roberts instead opted to work for the government, and he held a distinguished career with two Republican administrations, those of Presidents Ronald Reagan and George H. W. Bush ("Bush 41," as he became known after his son assumed the presidency in 2000). From 1981 to 1982, Roberts served in the Justice Department as Special Assistant

[437] U.S. Congress, Senate, Committee on the Judiciary, *Confirmation Hearing on Federal Appointments,* 108th Congress, 1st session, January 20, 2003: 305.

to the Attorney General, William French Smith, who was both an advocate for, and defender of, the Reagan administration's policies on federalism and the belief in the need for greater judicial restraint, especially with respect to the Supreme Court. In 1982, Roberts accepted a position in the White House Counsel's Office, where he worked for Fred F. Fielding, Counsel to the President. Roberts served as Associate Counsel to the President, a post he held until 1986.[438] After President Reagan's term in office ended, Roberts joined the firm Hogan & Hartson. Roberts worked as a lawyer for the Bush/Quayle Executive Committee during the 1988 presidential election, and one of his roles included conducting "opposition research," as he wrote on a questionnaire when he applied for a position with the newly-elected Bush administration.[439] Roberts resigned his partnership at Hogan & Hartson in 1989 when he received an appointment within the Bush administration as Principal Deputy Solicitor General, and from 1989 until 1993 Roberts worked under Solicitor General Kenneth W. Starr.[440] In 1993 Roberts rejoined Hogan & Hartson, and from 1993 until his appointment to a seat on the appellate court, Roberts argued 39 cases before the Supreme Court. In other words, Roberts had 39 opportunities to hone his oral and written communication skills, 39 opportunities to

[438] See, for example, Hensley, Baugh, and Smith, "The First-Term Performance of Chief Justice John Roberts," 628, and Lynn Vincent, "Roberts Rules," *World* 20 (2009): 13.

[439] Letter, Chase Untermeyer to John G. Roberts, September 22, 1989, folder "Presidential Appointment Files—Priority Resumes [sic] File," OA/ID 41567, [Staff Person Unknown] files, Personnel Office, Bush Presidential Records, George Bush Presidential Library. Chase Untermeyer held the position of Assistant to the President and Director of Presidential Personnel.

[440] Vincent, "Roberts Rules," 14.

revise his argumentative and rhetorical strategies, and 39 opportunities *to think* (and write) like a Justice.

Many people who opposed Roberts' nominations for an appellate court seat and for a seat on the Supreme Court, though, complained that Roberts lacked a lengthy paper trail which they could review to discern his judicial philosophy and temperament. As a result, many critics saw Roberts as a stealth candidate that another Republican administration wanted to place in influential posts in the judicial branch. For example, after President Bush submitted Roberts' name for the open seat on the Court, one editorial criticized Roberts' lack of judicial experience, and the writers suggested that the limited paper trail Roberts left from his service in the Republican administrations and while in private practice revealed a conservative ideologue who "made arguments on abortion rights, free speech and church-state issues that are at odds with established law."[441]

It is true that the availability of Roberts' writings prior to his clerkships and service in the Reagan administration are limited. However, the 65,000 pages of documents released by the NARA provide ample opportunity to investigate the claims that Roberts was a stealth candidate and a potential jurist who harbored a judicial ideology or philosophy that posed a threat to mainstream American values, as critics of his nomination argued, or whether Roberts' writings reveal the temperament of a jurist who respected the rule of law. This chapter examines Roberts' writings—from his time

[441] "Does Roberts Represent Mainstream Law, Values?" 11A.

as a budding law student, to his time as an advocate for the Reagan administration's policies, and after his governmental service—to address those concerns.

The Pre-Administration Paper Trail

Roberts wrote and published very little while in law school. One publication, a "note" on the contract clause that appeared in the *Harvard Law Review*,[442] however, provided critics a writing that they could read, assess, and from which they could infer conclusions about Roberts' judicial philosophy. Roberts' note focused on one of the cases from the Court's 1977 Term, *Allied Structural Steel Company* v. *Spannaus*.[443]

In 1974, the Minnesota state legislature passed the Private Pension Benefits Protection Act. The Act imposed a "pension funding charge," which was an assessment the state could levy "against a company terminating its pension plan or closing its Minnesota office if existing pension funds were inadequate to secure full pensions for all employees who had worked for more than ten years with the company."[444] Prior to the passage of the statute, Allied planned to close its office in Minnesota, which it did shortly after the legislature passed the Act. As a result of Allied's action, Minnesota demanded that Allied pay the pension funding charge to compensate those employees who had worked for Allied for more than ten years but who lacked vested pension rights. Allied countered that Minnesota's demands and the Act "unconstitutionally impaired

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[442] John G. Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," *Harvard Law Review* 92 (1978): 87-99.

[443] 438 U.S. 234 (1978).

[444] This is Roberts' summary of §181B.04 (1976) of the Act. Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 87-88.

[Allied's] contractual obligations" with its former employees, and Allied sought an injunction in district court against the state's actions.[445] The district court determined that Minnesota's actions were reasonable and that the financial obligations Allied owed were not unreasonable, and the court held that "the Act should [not] be declared unconstitutional."[446] Allied promptly appealed the court's decision to the Supreme Court.

Upon appeal, the Supreme Court ruled in favor of Allied. Writing for the majority, Justice Harlan Stewart found that first, the Minnesota legislature significantly altered Allied's contractual obligations to the pension fund, and second, the Act only protected a narrow class of individuals rather than protecting a "broad social interest;" consequently, Stewart's opinion held that the Act therefore violated the Constitution's "Contract Clause" ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ").[447] Justice Brennan wrote a dissenting opinion in which, as Roberts explained, Brennan argued that the contract clause "was not even relevant to the case."[448] Roberts dedicates the majority of his note to critiquing Brennan's rationale for his dissent.

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[445] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 88.

[446] *Fleck* v. *Spannaus*, 449 F.Supp. 644 (D. Minn. 1977): 649.

[447] Article II, section 10, clause 2. See *The Debate on the Constitution, Part One* (New York: The Library of America, 1993): 974.

[448] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 89.

Roberts first evaluates Brennan's "threshold question of whether the contract clause applies at all to this case." Brennan determined that the clause prohibits companies from abrogating their contractual obligations; the clause, however, did not forbid legislatures from imposing additional contractual burdens on contracting parties, and therefore the case did not raise a commerce clause concern.[449] Roberts, though, disputes Brennan's doctrinal arguments and Roberts offers an argument by analogy in which he notes that "Brennan's distinction can technically be drawn in some cases, [but] it is not clear whether there is any justification for applying it to contract clause analysis."[450] To justify his claim, Roberts reframes Brennan's argument. He briefly summarizes Brennan's interpretation of the clause, in which he says that Brennan "relied on the history surrounding the clause's enactment, its wording, and precedent," which for Brennan meant that the Framers intended for the clause to prevent "rampant state legislative interference with the ability of creditors to obtain the payment or security provided for by contract," as Brennan wrote in his dissent.[451] Roberts agrees with

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[449] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 89.

[450] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 90.

[451] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 90. In full, Brennan wrote: "Although the debates in the Constitutional Convention and the subsequent public discussion of the Constitution are not particularly enlightening in determining the scope of the Clause, they support the view that the sole evil at which the Contract Clause was directed was the theretofore rampant state legislative interference with the ability of creditors to obtain the payment or security provided for by contract. The Framers regarded the Contract Clause as simply an adjunct to the currency provisions of Art. I, § 10, which operated primarily to bar legislation depriving creditors of the payment of the full value of their loans. . . . The Clause was thus intended by the Framers to be applicable only to laws which altered the obligations of contracts by effectively relieving one party of the obligation to perform a contract duty." See Brennan, Dissent, 438 U.S. 234 (1978).

Brennan's approach to interpreting the clause, which Brennan arrived at from his reading of the historical papers on the Constitutional Convention debates, but Roberts offers his own argument from authority within the historical modality to rebut Brennan's conclusion. As Roberts noted, "it does not follow that the Framers intended the clause to be limited to this specific problem. The Framers' intent was probably a broader concern to 'inspire a general prudence and industry, and give a regular course to the business of society.' Such a concern would entail protecting parties not only from laws relieving contractual obligations, but also from laws imposing duties beyond those contracted for."[452] Roberts advances his argument from authority by referencing a line from James Madison's *Federalist #44*, which Roberts uses to ground his discernment of the 'Framers' intent,' and Roberts bases his supposition on the argument Madison makes concerning the lack of predictability within the law if legislatures haphazardly change the rules. As Madison wrote:

> The sober people of America are weary of the fluctuating policy which has directed the public counsels. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.[453]

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[452] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 91.

[453] James Madison, "Federalist No. 44: Restrictions on the Authority of the Several States," in *The Federalist Papers*, ed. Clinton Rossiter, 277-284 (New York: Signet Classic/Penguin, 2003), 279.

Roberts' argument thus presents an interesting perspective on judicial philosophies. On the one hand, Roberts offers the original intent component of originalism to defend his interpretation of the commerce clause, yet he also advances a component of positivism to advance his argument. That is, Roberts' argumentative strategy involves inferring that the intent of one of the Constitution's framers was the expectation that legislatures would enact valid laws to promote stability and predictability within the law, both of which are positivist concerns. In *Allied Steel*, the statute was not a valid rule/law because the legislature drastically changed the 'rule of recognition' upon which individuals and Court precedent relied.

Roberts, however, does not commit himself only to the originalist philosophy to defend his reading of the contract clause and its application to the instant case; in fact, he defends a non-originalist, 'living Constitution' position in which utilizes an argument from analogy within the doctrinal and textual modalities to support his previous claims. As Roberts explains,

> Furthermore, the Framers could hardly have been expected to identify the problem of state imposition of additional duties with "admirable precision" when the problems of state interference through the imposition of such duties was far in the future. "The great clauses of the Constitution are to be considered in light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time."[454]

Roberts argues that the commerce clause applies in *Allied Steel*, and he shifts his defense with the use of the prudential modality to support the ultimate conclusion he draws about

[454] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 91-92. Roberts quotes from *United States Trust Company* v. *New Jersey*, 431 U.S. 1 (1977): 15-16.

the Court's decision, which is that "*Allied Steel* represents an effort" to balance state power and individual rights "in a manner sensitive to modern needs and conditions."[455] Roberts' shift from an originalist to a non-originalist position allows him to support a prudentialist philosophy: the Court weighed the benefits of a upholding a questionably valid statutory regulation that promoted the rights of a small group of individuals against the costs of a suspect statutory regulation that both harmed corporations and failed to benefit societal rights in general, and the latter prevailed over the former.

Roberts' law review note, therefore, provides an initial glimpse into the judicial philosophy he supports. He defends an originalist position, but one that falls within the positivist theory, and he supports a prudentialist theory that incorporates positivist components into it. Roberts' note also reveals that he does not oppose the protection of individual rights; instead, he supports coherence within the law and opposes legislative initiatives that dramatically change the 'rule of recognition' in such a manner that the change significantly alters the stability and predictability of the law.

A single law review article, though, only reveals a small section of the picture regarding Roberts' judicial philosophy. Roberts' writings from his service during the Reagan administration reveal a more complete picture of the seemingly stealth candidate awaiting appointment to the bench.

The Paper Trail from the Reagan Administration

While some critics of Roberts' nomination to the Supreme Court hoped for a lengthier record of Roberts' writings, those who reviewed the documents that the NARA

[455] Roberts, Jr., "Contract Clause—Legislative Alteration of Private Pension Agreements," 99.

did release offered a preliminary assessment of Roberts. Two Court journalists noted that "[t]he Reagan-era memos portray a cocksure young lawyer whose writing was clear, highly attuned to political realities and occasionally sarcastic."[456] Court scholar Jeffrey Toobin noted that Roberts' "plainspoken memos . . . display wit, common sense, and conservative politics in equal measure."[457] Roberts' use of wit, or humor "characterized by a conscious, sophisticated cleverness,"[458] is not an example of the type of pejorative rhetoric that many critics disdain; instead, he uses wit in a deliberate and purposeful manner as part of a larger argumentative strategy for defending his positions on a variety of issues, such as his understanding of the separation of powers doctrine, his views on the law, the proper role for a judge deciding questions about the law, and the acceptable use of an office of the presidency.

Wit and Wisdom

During the early 1980's, the Reagan administration revitalized the doctrine of federalism, or the Tenth Amendment directive that the powers not expressly delegated to the federal government are reserved to the states. In 1983, as a move to reassert congressional authority, Georgia Democratic Congressman Elliott Levitas sent a letter to President Reagan in which he "propose[d] a 'Conference on Power Sharing' to determine 'the manner of power sharing and accountability within the federal

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[456] Jo Becker and Amy Argetsinger, "The Nominee as a Young Pragmatist," July 22, 2005, online at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/21/AR2005072101782.html (accessed March 26, 2010).

[457] Toobin, *The Nine*, 263.

[458] Pamela Hobbs, "Lawyers' Use of Humor as Persuasion," *Humor* 20 (2007): 125.

government.'" Roberts sent Fielding a memorandum about the letter, in which Roberts remarked, "There already has, of course, been a 'Conference on Power Sharing' to determine 'the manner of power sharing and accountability within the federal government.' It took place in Philadelphia's Constitution Hall in 1787, and someone should tell Levitas about it and the 'report' it issued."[459] That report, of course, was the Constitution.

Roberts' witty retort to Levitas' request allows Roberts to advance an argument through the structural modality. While Senator Levitas is upset that the administration does not support an unfettered legislative branch, the reality is that the Constitution addressed the appropriate balance of power within the government. At the same time, Roberts' memorandum, rather than defending a particular administration policy, instead reflects his view on the separation of powers doctrine, a view that remains consistent throughout his writings.

In addition to reviving federalism, the Reagan administration also sought to curb judicial excesses, such as the federal courts' and Supreme Court's forays into policy-making. One ongoing effort of the Attorney General's office, for example, was articulating a "judicial restraint" message whenever the opportunity presented itself. While Roberts' position within the Republican administration required him to defend the administration's positions and to follow the 'party line,' Roberts did reveal his personal beliefs on the proper role for a judge deciding questions about the law.

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[459] Memo, John G. Roberts to Fred F. Fielding, August 4, 1983, Assistant White House Counsel Memos, Ronald Reagan Library.

In October 1981, Roberts wrote Starr (who was at that time Counselor to the Attorney General) regarding U.S. District Judge Walter Nixon's opinions.[460] "I have read ten opinions written by Judge Nixon, chosen at random from among his earlier cases," Roberts wrote. "One characteristic of Judge Nixon's jurisprudence which causes some concern is his propensity to reach out and decide complicated questions of law which he admits need not be decided."[461] Roberts found that Judge Nixon often used "alternative reasoning" and would "reach for alternative bases of decision" and "opine on unnecessary matters" in his opinions.[462] Roberts admitted that Judge Nixon faced certain 'problems of the penumbra' in his cases, but Roberts questioned Judge Nixon's realist tendencies, especially in those cases in which Judge Nixon deviated from the statutory text and instead made the law from the bench.

One such case, *Kitchens* v. *State,*[463] involved a petitioner who filed a *habeas corpus* claim but appeared before Judge Nixon without counsel. Judge Nixon, therefore, "surveyed applicable cases and devised general rules concerning when counsel is

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[460] In 1968, President Lyndon B. Johnson nominated Walker Louis Nixon, Jr., for the U.S. District Court, Southern District of Mississippi. Nixon served from June 7, 1968, until the House impeached him on May 10, 1989, and he was removed from office on November 3, 1989, after a Senate vote. Nixon was impeached for committing perjury before a grand jury. Nixon appealed his case to the Supreme Court; see *Nixon* v. *United States*, 506 U.S. 224 (1993). Nixon lost his case before the Court, and his case was cited as precedent during the impeachment proceedings against President Bill Clinton. The Reagan Library file inadvertently identifies Walter as "Walker" Nixon.

[461] Memo, John G. Roberts to Kenneth W. Starr, October 1, 1981, folder "Judge Walker Nixon," Box 5 (Acc. #60-88-0494), Files of Carolyn B. Kuhl, Ronald Reagan Library.

[462] Memo, John G. Roberts to Kenneth W. Starr, October 1, 1981.

[463] 290 F.Supp. 856 (S.D. Miss. 1968).

required in habeas corpus cases." In the next sentence, as Roberts advises, "Such general rules should not be determined in the context of a case in which the issue is raised sua sponte and there is no controversy concerning the matter."[464]

At first glance, it appears that Roberts opposes certain individual rights' claims and that he questions the Sixth Amendment's directive for the right to counsel. In actuality, Roberts opposes Judge Nixon's efforts *to fix* the petitioner's problem (*sua sponte*, which is Latin for "of one's own will," usually refers to an order a judge issues without either party in the case making the request for that order), a correction that exceeds Judge Nixon's authority: the Constitution charges the legislative branch with the powers to make rules or correct their deficiencies, and the role of the judicial branch is to adjudicate questions involving those laws. Roberts' structural argument within the structural modality, and his positivist belief that Judge Nixon's realist actions undermine the validity of the judicially-created law, reveals that Roberts both holds a respect for the separation of powers doctrine and that he supports judicial restraint. At the same time, Roberts' opposition to Judge Nixon's actions reflects the prudentialist beliefs that judges should refrain from 'bold forays into policy-making' and instead let 'modesty and humility' guide their decision-making. Two years later, Roberts still maintained those positions.

In his 1983 "Annual Report on the State of the Judiciary," Chief Justice Warren Burger expressed his concerns regarding the Supreme Court's excessive caseload. In an effort to reduce the Court's workload, Burger proposed that Congress create an

[464] Memo, John G. Roberts to Kenneth W. Starr, October 1, 1981. Underlining in original.

Intercircuit Tribunal, "a special temporary panel of [Circuit Court] judges" who would hear "cases involving conflicts between the Courts of Appeals."[465]

Roberts, however, opposed the creation of the Tribunal. In a memorandum to Fielding, Roberts discusses his personal—not the administration's—objections to the Tribunal. Roberts writes:

> My own view is that the creation of a new tier of judicial review is a terrible idea. The Supreme Court to a large extent . . . controls its own workload, in terms of arguments and opinions. The fault lies with the Justices themselves, who unnecessarily take too many cases and issue opinions so confusing that they often do not even resolve the question presented. . . . So long as the Court views itself as ultimately responsible for governing all aspects of society, it will, understandably, be overworked. A new court will not solve this problem.[466]

Roberts bases his objection to the Tribunal on an institutional argument within the structural modality. The caseload problem originates with the Court's excessive efforts to review the decisions of other agencies (or other parties), a practice in which the Court need not engage; instead, deferral to the decisions of others offers a better solution for the Court's dilemma. At the same time, Roberts' presents his objections from a prudentialist position: the Court's practices exceed its 'breadth of authority,' and a more restrained judiciary is a step toward alleviating the Court's workload.

Chief Justice Burger's proposal for an Intercircuit Tribunal gained traction throughout the year, which forced the administration to enter the battle. As support for the Tribunal initiative grew, Roberts wrote his mentor, Judge Friendly, a letter in which

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[465] Memo, John G. Roberts to Fred F. Fielding, February 10, 1983, folder "JGR/Supreme Court (1)," Box 52, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

[466] Memo, John G. Roberts to Fred F. Fielding, February 10, 1983.

he discussed his fears about the Tribunal. Roberts' wit, evident in the letter, allows him to frame his concerns with the proposal. Roberts writes:

> The pressure behind the Chief Justice's Intercircuit Tribunal proposal – a Trojan horse that will inevitably give birth to a National Court of Appeals – is becoming irresistible. In confidence, our office is fighting the good fight against it, and has delayed Administration support for almost a year, but we cannot hold out much longer against the combined assault of the Chief, Congressional leaders, and . . . our own Justice Department. Our only hope is that Congress will do what it does best - nothing.[467]

Roberts describes his objections to the proposal with an extended metaphor, comparing the administration's fight to prevent an impending judicial tragedy to the tragedy of the Trojan War that resulted after the Greeks wheeled the Trojan horse inside their gates. Roberts' use of metaphor and wit as part of his argumentative strategy allows him to use the structural modality to frame his objections within the prudential philosophy. For Roberts, the judicial branch lacks the authority to push policy proposals on how the law should be administered, an authority constitutionally given to the legislative branch, and a National Court of Appeals is the antithesis of judicial restraint and represents a dangerous step toward upsetting the balance of power between the branches of government, a step that would significantly hinder the ability of the legislative branch to check the sweeping powers of the judicial branch, as well as a step that would strengthen the judicial branch's ability to alter the stability and predictability of the law.

A month later, Roberts again wrote Judge Friendly to update him on the administration's efforts to delay the Tribunal proposal. The administration appears to

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[467] Letter, John G. Roberts to Henry J. Friendly, October 11, 1983, folder "Chronological File (10/08/1983 – 10/17/1983)," Box 61, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

have adopted Roberts' initial, personal objections to the proposal, as Roberts explains in his letter that the administration will not support Burger's proposal "unless it is accompanied by reforms directed to the underlying causes of the caseload problem throughout the federal judiciary," reforms that "would include abolition of Supreme Court mandatory appellate jurisdiction, repeal of diversity jurisdiction, and restrictions on prisoner petitions (§ 1983 as well as habeas corpus)."[468] Roberts tells Judge Friendly that the administration's stand is "admittedly an odd position logically, but at least on the right side of the question."[469]

At first glance, it appears that Roberts opposes Court efforts to hear cases that involve basic constitutional rights' claims, a reading consistent with the misconception that Conservatives/conservatives oppose broad protections for individual rights, especially for criminals. In actuality, reminiscent of the position he took regarding Judge Nixon's efforts, Roberts opposes the Court's efforts to expand its power to, as Roberts earlier wrote, 'govern all aspects of society' and he opposes reforms that do not limit judicial discretion but instead allow judges to exceed the breadth of their authority. Roberts advances his prudential philosophy with an institutional argument within the structural modality that reflects his respect for the proper balance of power, though he doubts that Congress, the appropriate body to initiate the necessary reforms, will act to resolve Chief Justice Burger's concerns. Roberts again uses wit as part of his

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[468] Letter, John G. Roberts to Henry J. Friendly, November 18, 1983, folder "JGR/Intercircuit Tribunal," Box 29, John G. Roberts Files, 1982-1986, Ronald Reagan Library. Underlining in original.

[469] Letter, John G. Roberts to Henry J. Friendly, November 18, 1983.

argumentative strategy to advance his position, and as he notes in his closing remarks to Judge Friendly, "There will be peace in Lebanon before Congress repeals diversity jurisdiction or restricts prisoner petitions."[470]

Roberts' paper trail also includes memoranda on some rather strange events for which a person in his position need address. Nonetheless, Roberts uses wit to address the issues, and in so doing he further provides insight into the philosophy by which he resolves competing claims.

One issue involved the source of funding for an overseas trip. Jim Coyne, who served as Reagan's Director of the White House Office of Private Sector Initiatives from 1983 to 1985, apparently took great liberties while in his position. In March 1984, Coyne and some of his "staffers and advisory committee members" planned on visiting Japan "to establish the Ronald Reagan scholarship program." Coyne wanted to use private sector funding to cover his and the group's travel expenses, and he questioned whether he could use direct funding or indirect funding, such as "through a 501 (c) (3) [sic] organization such as the Asian Studies Foundation, on whose board he serves[.]" Roberts advised Coyne that he needed to use the "appropriated funds" budgeted to his office, and Roberts commented in a memorandum to Fielding that "[r]eviewing a Coyne proposal is very similar to taking a typical law school torts examination. The fact

[470] Letter, John G. Roberts to Henry J. Friendly, November 18, 1983.

situation in both instances is filled with countless legal issues and the key is to spot as many as possible."[471]

A month later, another issue that involved Coyne arose, this time on the production of a videotape on successful volunteerism programs initiated by the private sector. Coyne wanted to accept $20,000 from DuPont to fund the production of the videotape, which Coyne planned on distributing as "a product of the President's Advisory Council on Private Sector Initiatives."[472] Roberts wrote Fielding and noted that "[a]s is so often the case with Coyne, it is the unasked questions that raise the most serious concerns," and Roberts explained that Coyne's production of the videotape and its use as a fundraising tool did not fall within the legal parameters of the Council's advisory functions. As Roberts wrote, "The Federal Advisory Committee Act does not define 'advisory functions,' nor have there been any court decisions interpreting the term. If the limitation is to have any meaning, however, it would seem that producing a video tape [sic] for mass distribution goes beyond giving 'advice' to the President."[473]

Roberts' wit as a component of an argumentative strategy allows him to address the problems with both of Coyne's plans. On their face, Coyne's projects seem to fall legitimately within the law. Upon review, however, each presents a potential problem.

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[471] Memo, John G. Roberts to Fred F. Fielding, March 16, 1984, folder "JGR/PSI (Private Sector Initiatives) (4 of 10)," Box 44, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

[472] Memo, John G. Roberts to Fred F. Fielding, April 23, 1984, folder "JGR/PSI (Private Sector Initiatives) (4 of 10)," Box 44, John G. Roberts Files, 1982-1986, Ronald Reagan Library. Also see Memo, John G. Roberts to Fred F. Fielding, April 16, 1984, folder "JGR/PSI (Private Sector Initiatives) (4 of 10)," Box 44, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

[473] Memo, John G. Roberts to Fred F. Fielding, April 23, 1984.

To reveal the problem, Roberts advances an argument from dissociation, one that privileges the *integrity* of the office over the *image* of the office. In other words, both a scholarship and a videotape would create a positive image for the president, but both would negatively impact the integrity of how the president made use of the Office of Private Sector Initiatives. Funding a trip with money from the private sector and calling the scholarships "Reagan Scholarships" creates, according to Roberts, "supplementation of appropriations and/or conflicts [of interest] problems,"[474] and producing the videotape from within an office under the president's oversight also raises "supplementation" concerns. More important, though, as Roberts' demonstrates with a definitional argument within the doctrinal modality, Coyne's videotape project potentially violates the intent of a statutory act, and prudentialism dictates that Fielding advise Coyne against proceeding with his projects, since the costs associated with each outweigh the benefits that either project would bring for the president and his image.

Another issue that arose through Coyne's office (though not directly from him) involved pop singer Michael Jackson. In a memorandum to Fielding, Roberts explained that *Billboard* (a weekly music periodical) wanted to devote an entire issue to Jackson, and "Jackson's public relations firm has asked Jim Coyne to obtain a letter from the President highlighting the recent White House event." Roberts advises Fielding to deny the firm's request, once again inferring that acquiescing to the request would undermine

[474] Memo, John G. Roberts to Fred F. Fielding, March 16, 1984.

the president's integrity. As Roberts admonished, "enough is enough. The Office of Presidential Correspondence is not yet an adjunct of Michael Jackson's PR firm."[475]

Three months later, another Jackson issue arose. Coyne's office requested that the president send a letter to Jackson's personal manager in which the president thanked Jackson for donating 400 tickets to children who could not afford to purchase them. In his memorandum to Fielding, Roberts again displays his sharp wit:

> I hate to sound like one of Mr. Jackson's records, constantly repeating the same refrain, but I recommend that we not approve this letter. Sometimes people need to be reminded of the obvious: whatever its status as a cultural phenomenon, the Jackson concert tour is a massive commercial undertaking. The tour will do quite well financially by coming to Washington, and there is no need for the President to applaud such enlightened self-interest.
>
> It is also important to consider the precedent that would be set by the letter . . . a newcomer who goes by the name "Prince" . . . is apparently planning a Washington concert. Will he receive a Presidential letter? How will we decide which performers do and do not?[476]

Roberts uses this brief narrative to advance an argument from dissociation, one that privileges the *disinterested image* of the president over the *self-interested image* of the pop singer. The real issue is not the president's thanklessness for the donation of the tickets; instead, the real issue is that the president is not in the business of promoting singers. Roberts' advice, which reflects a prudential resolution to the issue, also presents a political twist on the judicial doctrinal modality. A restrained jurist refrains from issuing questionable precedential decisions that other courts must follow; likewise, an

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[475] Memo, John G. Roberts to Fred F. Fielding, September 21, 1984, folder "JGR/Pro Bono (9)," Box 45, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

[476] Memo, John G. Roberts to Fred F. Fielding, June 22, 1984, folder "JGR/Pro Bono (6)," Box 44, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

office of the president should not set a questionable precedent with respect to letter-writing, especially a precedent that it might not follow when future musicians stage concerts in Washington. The costs of initiating such a practice outweigh the benefits to sending a letter. Roberts' advice on the issue also reflects his positivism, as writing a letter to Jackson would undermine the current stability and predictability of a presidential practice, which is to not write letters that promote music idols or endorse commercial products. Ultimately, Roberts offered sage advice, as Prince's song "Darling Nikki" received top-billing in 1985 on the "Filthy Fifteen" list from the Parent's Music Resource Center as the most sexually explicit song (and the top song the PMRC wanted banned).[477]

Constitutional and Statutory Guidance

Roberts' paper trail includes memoranda on more substantive issues that provide further insight into the reasoning he uses to resolve competing claims. Some of the memoranda he wrote in response to a direct request from another office, and other memoranda he wrote to express his views on a particular topic. Examined closely, Roberts' writings do not reflect the tenor of a conservative ideologue; instead, they reveal the concerns of a cautious non-jurist who approaches questions of law with a respect for a balance of power among the three branches of government.

[477] See, for example, "Warning: Parental Advisory," online at <www.vh1.com/shows/series/movies_that_rock/warning/filthy.jhtml> (accessed June 1, 2011).

Civil Rights, Take I

In 1984, the Justice Department issued a report on a proposed anti-busing bill, the "Public School Civil Rights Act of 1983." Roberts wrote a memo to Fielding in response to the Office of Management and Budget's request for the Counsel office's view on the Senate bill. In his memo to Fielding, Roberts explained that Ted Olson, the Assistant Attorney General, "reads the early busing decisions as holding that busing may in some circumstance be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing."[478] Roberts offered a different perspective on the Court's holdings:

> I do not agree with his reading of the early cases. The holdings of those cases stand for the proposition that busing is permissible, and that state statutes limiting the authority of federal courts to order busing are unconstitutional. A far different question is presented when Congress attempts to limit the authority of the federal courts. Congress has authority under § 5 to enforce the Fourteenth Amendment, and can conclude - - the evidence supports this - - that busing promotes segregation rather than remedying it, by precipitating white flight. Even if Olson's reading of the 13-year old early busing cases is correct, we have now had over a decade of experience with busing. If that experience demonstrates that busing is not an effective remedy, Congress can legislate on the basis of that experience.[479]

Roberts' response to Olson's reading seems to support the position held by critics of Bobbitt's modalities, as Roberts simultaneously utilizes the historical, doctrinal, and structural modalities to advance his argument. However, rather than viewing the

[478] Memo, John G. Roberts to Fred F. Fielding, January 13, 1984, Assistant White House Counsel Memos, Ronald Reagan Library.

[479] Memo, John G. Roberts to Fred F. Fielding, January 13, 1984. Underlining in original memo.

simultaneous use of multiple modalities as a negative, the overlap in the modalities actually strengthens Roberts' argumentative strategy. Roberts advances an argument from authority and he bases his interpretation of the Court's holdings on Hamilton's *Federalist #33* and Madison's *Federalist #44* (historical), and the Supremacy Clause (structural),[480] which stands for the idea that the states cannot nullify federal law, such as Supreme Court decisions (doctrinal). One only need remember the Court's *Brown* v. *Board of Education*[481] decision and the state attempts to nullify the decision to understand Roberts' position on the bill. The correct solution, which Roberts also advances through the structural and prudential modalities and from a prudentialist perspective, is that if the costs to busing outweigh the benefits to it (which they may, if busing results in white flight), then the proper authority to implement the necessary change in the rules/laws is the federal legislative branch. A close reading of Roberts' statement, when examined through Bobbitt's modalities, reveals that Roberts does not oppose busing, as many critics claimed; instead, Roberts opposes the invalid approach for remedying the situation, a position consistent with the one he took regarding Judge Nixon's and Chief Justice Burger's judiciary reform efforts.

Many who opposed Roberts' nominations for seats on the appellate court and the Supreme Court argued that Roberts' paper trail demonstrated that he opposed women's

[480] Article VI, clause II.

[481] 347 U.S. 483 (1954).

rights and efforts to reverse gender discrimination.[482] A close reading of his memoranda devoted to women's issues and gender discrimination, however, reveal a far different picture than the one painted by his critics.

In 1982, Roberts wrote a memo to Attorney General Smith advising him to oppose the request for having the Civil Rights Division intervene in *Canterino* v. *Wilson*,[483] which involved alleged gender discrimination in the Kentucky Correctional Institution for Women (KCIW). In their suit, the plaintiffs raised a Fourteenth Amendment equal protection claim regarding the KCIW's lack of comparable educational and vocational training programs for the female inmates, programs to which male inmates within Kentucky's prison system had access.

Roberts based his objections to intervention on two grounds. First, intervention would signal inconsistency with the Attorney General's policy of judicial restraint, since "the equal protection claim will be based on semi-suspect treatment of gender

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[482] See, for example, the testimony of Wade Henderson, the Executive Director of the Leadership Conference on Civil Rights, at Judge Roberts' confirmation hearings. Henderson selectively quotes from Roberts' memos, and as such, his interpretation of Roberts' writings and positions omits many of the important justificatory conclusions Roberts offers for his positions.

[483] 546 F.Supp. 174 (W.D. Ky. 1982) and 562 F. Supp. 106 (W.D. Ky. 1983), and 869 F.2d 948 (6th Circ. 1989). The Department of Justice ultimately filed a complaint in intervention on March 11, 1982, citing an equal protection violation. In its first memorandum opinion, the U.S. District Court, Western Division Kentucky, Louisville Division, found that the plaintiffs should have access to "work and study programs" but noted that "[t]he inferiority of programs and discrimination" may not have been "the result of conscious sex discrimination." In its second memorandum opinion, the district court held that the inmates at KCIW had a "fundamental constitutional right to meaningful access to the courts." On appeal, the Sixth Circuit Court of Appeals vacated the district court's decision and held "that no constitutional violation was proven in this case." Ironically, the Court of Appeals based its decision on one of Roberts' arguments when it explained that "there was no proof of gender-based discrimination."

classification."[484] Second, "relief could well involve judicial interference with state prison programs."[485] For both positions, Roberts makes an institutional argument within the structural modality to justify his advice to Smith. While gender discrimination exists, the Justice Department lacks the authority to define what does and does not qualify as an individual right; that determination lies with the legislatures, and Smith should not signal that judges now possess the power to legislate rights into existence. Moreover, Roberts' advice echoes his theme of judicial restraint: the proper authorities for correcting the flaws with state prison systems, and the correct constitutional directive for alleviating the problem, again rests with the legislative branches of the state governments.

Roberts' closing remarks to Smith, though, support the position that Roberts opposes intervention based on a prudential philosophy. "Many reasonable justifications for the Kentucky practices can be readily advanced, such as economies of scale calling for certain programs for the male prisoners but not for the many fewer female prisoners," he wrote. "If equal treatment is required, the <u>end result</u> in this time of tight state prison budgets may be <u>no programs for anyone</u>."[486] Roberts assesses the disparity through a cost/benefit analysis: educational and vocational programs are expensive, and in a tight fiscal environment, allocating more money for programs is not an option; the more likely result would be the elimination of *all* programs to achieve gender-access parity. The

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[484] Memo, John G. Roberts to the Attorney General, February 12, 1982, folder "Civil Rights Division," Box 4 (Acc. #60-88-0495), General Correspondence Files, 1981-1984, Ronald Reagan Library.

[485] Memo, John G. Roberts to the Attorney General, February 12, 1982.

[486] Memo, John G. Roberts to the Attorney General, February 12, 1982. Underlining in original.

prudent decision involves maintaining the *status quo*, since pressing the access issue poses a greater danger. Roberts' position, therefore, is not an opposition to reversing gender discrimination; instead, his position is one that protects access to limited resources for women.

Two additional memos provide further support to refute critics' charges against Roberts. In a memo to the Attorney General, Roberts noted that the Secretary of Education, Terrel Bell, believed that implementing a "regulation prohibit[ing] sex discrimination" based on "appearance codes" is "an area more suitable for local than federal regulation," which Roberts agrees is "an eminently sound conclusion."[487] In another memo, Roberts responded to objections from some Conservative publications regarding proposed revisions to the Criminal Code. The revisions would increase fines for many offenses, as well as compensate the victims of certain types of crimes. As Roberts explained to Smith, "[s]ome of the more specific objections [to penalties for sex-related crimes] are absurd - - such as the assertion that a compensation scheme for victims of violent offenses (including rape) would create federal funding of abortions."[488]

Roberts' statements in both memoranda are consistent with the positions he advocated in the previously discussed memoranda. Roberts' use of an institutional argument within the structural modality to identify the proper authority for resolving sex

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[487] Memo, John G. Roberts to the Attorney General, July 1, 1982, folder "John G. Roberts, Jr. Misc.," Box 30 (Acc. #60-8-0372), Records of the Attorney General, Ronald Reagan Library.

[488] Memo, John G. Roberts to Tex Lezar, February 16, 1982, folder "John G. Roberts, Jr. Misc.," Box 30 (Acc. #60-89-0372), Records of the Attorney General, Ronald Reagan Library.

discrimination at the local/state level parallels the Tenth Amendment argument he advanced regarding Levitas' letter. Roberts uses an argument by dissociation to express that ethically, the heinous crime of rape and the legally permitted, conscious decision to have an abortion are not comparable; in this instance, the opponents' slippery slope argument is a fallacy. The argumentative strategy that Roberts advances in each memorandum again falls within the prudential philosophy, and both memos demonstrate that Roberts does not oppose women's rights or the efforts to reverse gender discrimination.

Disrobing the Supreme Court

The Reagan administration's preoccupation with curbing the excesses of the Supreme Court and curbing both Justices and judges forays into policy-making and unprincipled decision-making cannot be understated. The administration perceived the danger from an activist and unrestrained judiciary as serious threat to the balance of power within the government, not to mention to its policy agenda. Two of Roberts' writings exemplify the magnitude of the crisis the administration believed it faced. While both writings are advocacy pieces for the administration and therefore are not clear examples of Roberts' personal beliefs, both hold importance for this project, as they reflect the legal reasoning and decision-making processes in which Roberts engages to resolve constitutional questions, and they provide insight into how Roberts constructs his argumentative strategies to resolve competing claims. Each advocacy piece, therefore, deserves critical attention.

In 1982, the Attorney General requested "two versions of introductory language" for a larger document on "Supreme Court Jurisdiction" involving school prayer cases.[489] Evidently, the Attorney General had not taken a position on whether he (or the Justice Department) should support an effort by Congress to divest the Supreme Court of appellate jurisdiction in school prayer cases. Roberts drafted two versions of a document that addressed whether Congress could exercise its Article III "exceptions" authority, one document which concluded that Congress could exercise its authority on the First Amendment issue, and the other document which concluded that it could not. That Roberts could advocate both positions is not surprising; the manner by which he did it is surprising.

Roberts used the textual modality to arrive at an original meaning conclusion, and he began both versions of the document with the same paragraph: "After careful consideration we have concluded that Congress has the constitutional power to divest the lower federal courts of jurisdiction over school prayer cases. Under Article III, section 1 Congress has discretion whether to create lower federal courts at all, and it follows that the jurisdiction of such courts, once established, is also discretionary."[490]

In the first version, Roberts wrote a lengthy paragraph in which he argued that despite that discretion, "Congress does not have the power to divest the Supreme Court

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[489] Memo, John G. Roberts to the Attorney General, April 13, 1982, folder "Supreme Court Jurisdiction," Box 6 (Acc. #60-88-0498), Correspondence Files of Kenneth W. Starr, Counselor to the Attorney General, 1981-1983, Ronald Reagan Library.

[490] Memo, John G. Roberts to the Attorney General, April 13, 1982. All quotations from the two different paragraphs are from this memo.

of appellate jurisdiction over school prayer cases." He offers three reasons for his conclusion. The first reason, which he advances through the structural modality, relates directly to the separation of powers doctrine. While Article III allows Congress to exercise its "exceptions" power, "a broad reading of this clause authorizing Congress to divest the Supreme Court of appellate jurisdiction over constitutional cases would essentially eliminate the federal judicial branch as an independent check on Congress." The second reason, which he advances through the structural and prudential modalities with an argument from coherence, involves the ultimate outcome for constitutional cases in the absence of the Court's appellate jurisdiction. "If Congress were permitted to exercise the asserted authority over Supreme Court appellate jurisdiction, the highest courts of the 50 states would become the final arbiters of the federal Constitution in school prayer cases. This could result in disparate readings of the same constitutional provision in different states, with no final federal judicial review to guarantee the supremacy and uniformity of federal law." According to Roberts' reasoning, the First Amendment's Free Exercise of Religion protections would be subject to the whims of fifty different state supreme courts. Roberts makes a valid point: the impact of "disparate readings" and, for that matter, disparate decisions, would radically alter the established case law concerning acceptable and unacceptable religious practices. Roberts frames his reason by incorporating a positivist component (the stability and predictability of the law) within the prudentialist philosophy (the disparity costs outweigh any divestiture benefits). Roberts' third reason, which he supports with an argument from authority within the historical modality, is an original intent conclusion: "We find such a prospect

very troublesome, and are persuaded on balance that the Framers did not intend Congress to have the power to bring about such a result."

In the second version, Roberts wrote a slightly smaller paragraph in which he concluded "that Congress has the constitutional authority to divest the Supreme Court of appellate jurisdiction in school prayer cases." Roberts uses the historical modality to justify his original meaning conclusion. He turns to the ultimate authority—the Constitution—on the appellate jurisdiction issue, and he references the text of Article III, section 2 ("such exceptions . . . as the Congress shall make") to conclude that "[t]his clear and unequivocal language supports the exercise of power over Supreme Court appellate jurisdiction in S. 1742." Roberts then puts an interesting spin on "the highest courts of the 50 states" danger from the first version of his text. "State laws and rules concerning prayer in public schools or other public buildings would still remain subject to judicial review in the state courts," he wrote. "While we are concerned about the possibility that these courts could reach disparate results on the same question of federal law, this prospect does not justify a departure from the express decision of the Framers to leave the scope of the federal judicial institution to the discretion of the Legislature." The state supreme courts are now simply all courts, and "the same constitutional provision" is now "the same question of federal law." Roberts' ultimate conclusion in this version omits the positivist component from the first version and instead incorporates components of the originalist philosophy into the prudentialist philosophy, where the benefits of the Court possessing appellate jurisdiction do not outweigh the

costs of violating the Framer's intent or restricting a constitutional directive regarding Congress' legislative powers.

The two versions of Roberts' document illustrate the tensions associated with judicial philosophies. Similar argument 'types' and modalities influence the philosophy by which one advances a position, as both comprise the argumentative strategy chosen to resolve the competing claims. The selection of a particular *component* of a philosophy, rather than the selection of the *complete* philosophy, however, appears to allow for a more persuasive conclusion for the competing claims. The legal reasoning process over constitutional or statutory questions involves carefully incorporating the three to legitimate the resolution of the questions. Thus, making a broad generalization about the philosophy to which a jurist adheres seems to omit an important part of the equation when that generalization fails to account for the argument 'type' and modality the jurist used in the decision-making process. A much larger document Roberts wrote clarifies further the above contention.

As part of the ongoing effort to find solutions to the threat of an emboldened judiciary, Roberts attended an American Enterprise Institute conference, the theme of which was "Judicial Power in the United States: What are the Appropriate Constraints?" At the request of Ken Starr, Roberts wrote a six-section, 27-page memorandum, "Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments." Starr referred to Roberts' memo as "an advocacy piece,"[491]

[491] Note, Kenneth Starr to Ted [Olson], October 30 (No Year), folder "Supreme Court Jurisdiction," Box 6 (Acc. #60-88-0498), Correspondence Files of Kenneth W. Starr, Counselor to the Attorney General, 1981-1983, Ronald Reagan Library.

and Roberts prefaces the text of his memo by conceding that "this memo is prepared from a standpoint of advocacy of congressional power over the Supreme Court's appellate jurisdiction; it does not purport to be an objective review of the issue, and should therefore not be viewed as such."[492] As with the school prayer document, however, this advocacy piece reflects the legal reasoning and decision-making process in which Roberts engages to resolve constitutional and statutory questions and it provides further insight into how Roberts constructs his argumentative strategies to resolve competing claims.

As in the school prayer document, Roberts began the first section with a discussion on the historical background of the Exceptions Clause. Roberts quotes the text of Article III, section 2, clause 2, which gives Congress the power to divest the Supreme Court of appellate jurisdiction: " . . . the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. (Emphasis added)." Roberts then explains, "The underscored language stands as a plenary grant of power to Congress to make exceptions to the appellate jurisdiction of the Supreme Court . . . the power to make exceptions to the Court's appellate jurisdiction exists by virtue of the express language of the clause over questions of both fact and law. This clear and unequivocal language is the strongest argument in favor of congressional power and the inevitable stumbling block for those

[492] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments" (No Year), folder "1522-Supreme Court Jurisdiction," Box 5 (Acc. #60-88-0173), Files of William Bradford Reynolds, 1981-1988, Ronald Reagan Library: 2.

who would read the clause in a more restricted fashion."[493] Roberts' statement is a near word-for-word reiteration of the second version of the school prayer document, but he adds the "stumbling block" qualifier, which suggests that the second of the two prayer versions is the stronger. Roberts concludes the first section of this advocacy piece with an argument from authority within the historical modality. He frames the issue from an original intent perspective to preempt counterarguments advanced from a 'living Constitution' perspective. Roberts writes:

> This focus on the plain language of the exceptions clause is not a simplistic approach. The Framers were not inartful draftsmen and can be expected to have known how to express the more restricted interpretations advanced by modern commentators had such constructions in fact been intended. In this regard it is important to recognize that we are not considering a constitutional clause that is by its nature indeterminate and incapable of precise or fixed meaning, such as the due process clause or the prohibition on unreasonable searches and seizures.[494]

In section two, Roberts explains in greater detail the Framers' intent for the exceptions clause, drawing upon the Seventh Amendment to bolster his position. According to Roberts, "Proponents of ratification [of the Constitution] did point to the exceptions clause in response to criticisms that the Supreme Court possessed the power to violate the right to a jury trial by appellate review of questions of fact. It is a nonsequitur [sic], however, to argue that the clause was therefore intended for this purpose alone."[495] As Roberts explains, "Even if the Framers were concerned about the

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[493] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 2.

[494] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 4.

[495] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 6.

vulnerability of jury determinations, the exceptions authority they provided went well beyond that particular problem . . . statements made by supporters of the Constitution concerning the exceptions clause . . . did not at all suggest a limited scope to Congress' power under the clause."[496] Roberts presents several arguments from authority to support his position, and he quotes Alexander Hamilton's *Federalist #81,* Chief Justice John Marshall, and Virginia Governor Edmund Randolph to advance his claim that the Framers intended for Congress to have the power to make exceptions to the Supreme Court's appellate jurisdiction. Roberts then draws a more specific reference to the Seventh Amendment. "It is difficult to see what happened in the short period between ratification of the Constitution and enactment of the Seventh Amendment that created a need for the Seventh Amendment if there was no such need at the time of ratification of the Constitution," Roberts wrote. "Further, if the purpose of the exceptions clause was to protect jury determination of fact, it is difficult to understand why the Framers did not take a direct approach as was soon done in the Seventh Amendment."[497] Roberts again advances his position through the historical modality, and the originalist position he defends incorporates the history behind the ratification of the amendments from which he makes inferences to justify his reasoning. Roberts concludes the second section by noting that "the language of the exceptions clause does not support an interpretation limiting the power to make exceptions to questions of fact."[498]

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[496] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 6.

[497] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 7.

[498] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 8.

In the third section, Roberts shifts to the doctrinal modality and he discusses the exceptions clause in relation to the Supreme Court's precedential decisions on the clause. Roberts begins the section by writing, "Judicial pronouncements on the exceptions clause also support Congress' power to divest the Supreme Court of appellate jurisdiction over certain classes of cases."[499] Roberts focuses on *Ex parte McCardle*,[500] a case in which a military governor ordered United States marshals to hold a Mississippi newspaper editor. McCardle applied to a federal circuit court for *habeas corpus* relief, which the court subsequently denied. McCardle then appealed to the Supreme Court under the Habeas Corpus Act of 1867. While his case was pending before the Court, Congress passed an act that repealed the sections of the 1867 Act that allowed for *habeas* appeals to the Court. President Andrew Johnson vetoed Congress' new act, and Congress subsequently overrode the president's veto, thus nullifying the appellate provisions of the initial act and therefore divesting the Court of appellate jurisdiction. According to Roberts' reading of Congress' action, "The legislative history of the repealer [sic] provision left no doubt that Congress' purpose was to prevent the Court from deciding the McCardle [sic] case and perhaps undermining the entire military reconstruction scheme."[501] And, Roberts notes, in the *McCardle* decision, "A unanimous Court upheld the power of Congress to divest the Supreme Court of jurisdiction."[502]

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[499] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 8.

[500] 74 U.S. (7 Wall.) 506 (1868).

[501] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 8.

[502] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 8.

Roberts cites other decisions that further bolster his claim, but he notes that "McCardle is simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says."[503]

In the fourth section, Roberts presents the arguments commonly made by those who believe "that the Constitution requires that the Supreme Court be capable of insuring the uniformity and supremacy of federal law."[504] He begins with an argument from coherence that is similar to the disparity argument he advanced in the first version of his school prayer document. As Roberts explained, "[w]ith no appellate review in the Supreme Court, state courts could refuse to uphold the supremacy of federal law, and reach different conclusions on identical questions of federal law."[505] After quoting from Hamilton's *Federalist #80* and opinions from Justice Joseph Story and Chief Justice Marshall[506] on the importance of the stability and predictability of the law, Roberts concludes that the positivist concern "confuses a permissive grant of constitutional authority with a constitutional requirement."[507] Roberts says that Justice Story and Chief Justice Marshall's "opinions . . . establish the principle that the Supreme Court's

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[503] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 12. Underlining in original.

[504] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 13.

[505] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 14.

[506] See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) and *Cohens* v. *Virginia* 19 U.S. (6 Wheat) 264 (1821).

[507] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 15.

exercise of appellate jurisdiction is entirely dependent upon an act of Congress."[508] Furthermore, Roberts argues that in those opinions, "the Court did not consider such jurisdiction to be required by the Constitution, even in the pursuit of the identified goals of federal supremacy and uniformity in the interpretation of federal law. Rather the matter was one for Congress to decide on policy grounds . . . "[509] Roberts' use of the structural, doctrinal, and prudential modalities frames the next step in his argumentative strategy, which addresses the concern "that permitting Congress to make exceptions to the Supreme Court's appellate jurisdiction would put Congress above the judicial branch and undermine the entire structure of checks and balances established by the Constitution."[510] Roberts notes that the "short answer . . . is . . . Congress is not attempting to dictate any particular result. Other courts of competent jurisdiction, either lower federal courts or state courts, would still exist and have the capacity to declare acts of Congress unconstitutional."[511] Roberts' reasoning, though, appears to contradict the nullification and Supremacy Clause concerns he discussed in his anti-busing memo, though Roberts does offer a simple, structural, positivist solution: "[t]hose who truly believe that the exercise of this exceptions power threatens the system of checks and

[508] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 15.

[509] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 15.

[510] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 19.

[511] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 19-20.

balances should pursue the remedy suggested by Justice [Owen J.] Roberts, namely amendment of the Constitution to remove Congress' exceptions power."[512]

In the fifth section, Roberts discusses the pending proposals in Congress that would divest the Supreme Court of appellate jurisdiction and he refutes two constitutional objections to Congress' exercise of its exceptions power. Roberts begins by explaining that Congress' power "under the exceptions clause is as subject to the due process clause, and the equal protection component of the due process clause, as the exercise of any other constitutional grant of power."[513] He argues, however, that "[t]he pending proposals . . . do not seem to present a serious due process problem, since they all provide for at least some judicial forum, either the lower federal courts or state courts, to hear any claims." Moreover, he says, "[d]ue process does not require judicial review in a federal court or final review by the Supreme Court," a conclusion he explains in the closing paragraph of the section:

> Any proper application of fundamental rights equal protection analysis would have to be based on an asserted fundamental right of access to federal court, rather than any fundamental right to an abortion or the exercise of First Amendment freedoms. . . . Access to federal court, however, has never been identified as a fundamental right. The fundamental right involved in this area is the right to due process, and that right can be satisfied by access to state courts.[514]

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[512] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 21. See Owen J. Roberts, "Now is the Time: Fortifying the Supreme Court's Independence," *American Bar Association Journal* 35 (1949): 1-4.

[513] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 22-23.

[514] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 25.

Roberts thus reframes the due process and equal protection concerns by offering a quasi-definitional argument within the structural modality, though in so doing he seems to violate the basic precepts of the positivist and prudentialist theories. Nonetheless, Roberts' argumentative strategy attempts first, to change the conventional understanding of the place where due process claims are resolved (the Supreme Court) to an understanding that *all* courts can resolve due process claims, and second, to alter the understanding of what is and is not a fundamental right, and access to the Supreme Court is not a fundamental right.

In the final section of his advocacy piece, Roberts further justifies Congress' power to divest the Court of appellate jurisdiction based on §5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." Roberts argues that "the broad scope of §5" grants Congress the authority "to determine that in certain cases, such as abortion and desegregation cases, the guarantees of due process and equal protection are more appropriately enforced by state courts" rather than by the Supreme Court.[515] Roberts writes that "[t]he history of the Fourteenth Amendment strongly supports the authority of Congress to advance its view of the appropriate means of enforcing the guarantees of due process and equal protection under §5. The Fourteenth Amendment was drafted and passed in an atmosphere of great hostility to the Supreme Court."[516] Roberts identifies "the Dred Scott and Fugitive Slave decisions" as "defeats at the hands of the High Court" for the

[515] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 25.

[516] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 25.

Reconstruction Congress that "drafted and passed the Civil War Amendments." Consequently, Roberts writes, "[a] court which would render such decisions was certainly not to be entrusted with securing the protections of the Thirteenth through Fifteenth Amendments. In the view of the Framers of the Civil War Amendments, therefore, Congress was to have primary responsibility for providing for the enforcement of the guarantees of due process and equal protection."[517] Roberts concludes the final section, and thus his memo, by writing, "it is important to remember that the Framers of the Fourteenth Amendment intended it to be enforced primarily by Congress, and not the federal courts. Whatever validity 'structural' arguments concerning the role of the federal judiciary may have in other contexts, these arguments are considerably weakened in the area of Fourteenth Amendment claims."[518] Roberts thus ends where he began, with an argument from authority within the historical modality and from an original intent perspective.

As with the two versions of the school prayer document, Roberts' "Proposals to Divest the Supreme Court" memorandum illustrates the tensions associated with judicial philosophies. In the lengthier text, Roberts' writing demonstrates that similar argument 'types' and modalities influence the philosophy by which one advances a position, as both comprise the argumentative strategy chosen to resolve the competing claims. The selection of a component from a philosophy allows for more persuasive conclusions for the competing claims, and a well-developed argumentative strategy that incorporates

[517] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 26.

[518] Memo, John G. Roberts, "Proposals to Divest the Supreme Court of Appellate Jurisdiction," 27.

'type,' modality, and component strengthens the legal reasoning process over statutory or constitutional questions. Thus, a generalization about the philosophy to which a jurist adheres should include all three elements of the equation.

The Ultimate Warm-up for the "Big Show"

Roberts' paper trail includes several memoranda on the nomination of judges and judicial philosophies. Each memo parallels the prudentialist idea that he advocated in his other letters and memos in which he suggested that a jurist should avoid policy-making, practice judicial restraint, and exercise 'modesty and humility.' In one memo, for example, he wrote that while judges may hold a "personal ideology" about the law, any judicial appointees should "recognize that their ideology should have no role in the decisional process - - i.e., so long as they believe in judicial restraint."[519] In another memo, he commented on the criticism that many of Reagan's judicial appointees, once on the bench, decided cases consistent with the administration's policy goals. Roberts disputed that claim and reframed it. "Judges do not implement policy in the true conservative view of things," Roberts wrote, "and the hot issues of today will not be those of ten or fifteen years hence, when our judges will be confronted with new social issues."[520] Roberts stressed that instead of appointing judges who would carry out the

[519] Memo, John G. Roberts to Tex Lezar, February 16, 1982, folder "John G. Roberts, Jr. Misc.," Box 30 (Acc. #60-89-0372), Records of the Attorney General, Ronald Reagan Library.

[520] Memo, John G. Roberts to Tex Lezar, February 16, 1982.

conservative agenda from the bench, "candidates" were selected for their "proper appreciation of the judicial role."[521]

The most interesting documents, and arguably two of the most important documents, received scant media coverage (save a few legal blogs) from those investigating Roberts' paper trail, especially those vetting the records released from the Reagan library.

In 1981, President Reagan nominated Sandra Day O'Connor for a seat on the Supreme Court. As her confirmation hearings neared, Roberts sent her a memorandum in which he advised her on "the proper scope of questioning Supreme Court nominees."[522] With regard to Senators on the Judiciary Committee asking questions about hypothetical cases to discern a nominee's judicial philosophy, a concern arose as to whether a nominee's response to a hypothetical should disqualify that person from hearing a similar case on which the nominee provided an answer during the confirmation hearings. Roberts rejected that position and offered O'Connor his personal view on the situation: "The proposition that the only way Senators can ascertain a nominee's views is through questions on specific cases should be rejected. If nominees will lie concerning their philosophy they will lie in response to specific questions as well. The suggestion that a simple understanding that no promise is intended when a nominee answers a

[521] Memo, John G. Roberts to Tex Lezar, February 16, 1982.

[522] Memo, John G. Roberts to Sandra Day O'Connor, September 9, 1981, folder "Kuhl Miscellaneous," Box 5 (Acc. #60-88-0494), Files of Carolyn B. Kuhl, Ronald Reagan Library.

specific question will completely remove the disqualification problem is absurd. The appearance of impropriety remains."[523]

More important than Roberts' advice to O'Connor, however, is the narrative he provided to Starr regarding his work with O'Connor. "My involvement in the Judge O'Connor appointment process began my first day on the job, August 10," Roberts wrote. "I started in on the process of preparing draft answers to questions that were likely to be asked during the confirmation hearings."[524] His "approach was to avoid giving specific responses to any direct questions on legal issues likely to come before the Court," and instead to provide O'Connor with "a firm command on the subject area and awareness of the relevant precedents and arguments," a process that continued "right up to the day before the hearings began." Roberts informed Starr that he read the transcripts of "past confirmation hearings," including those "of the Chief Justice and Justices Stevens, Harlan, Stewart, and, with your help, Blackmun," and Roberts prepared "[a] topic outline" of the questions from the hearings for the Chief Justice, Blackmun, and Stevens "to identify the major areas of questioning and pet projects and concerns of Judiciary Committee members." Roberts noted that he also "drafted the reply to the questionnaire item on judicial activism, and researched past hearings . . . concerning the practice of past nominees in not commenting on recent decisions." Roberts also

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[523] Memo, John G. Roberts to Sandra Day O'Connor, September 9, 1981.

[524] Memo, John G. Roberts to Kenneth W. Starr, September 17, 1981, folder "KWS/O'Connor Miscellaneous," Box 12 (Acc. #60-88-0498), Correspondence Files of Kenneth W. Starr, Counselor to the Attorney General, 1981-1983, Ronald Reagan Library. All quotations involving Roberts' work on the O'Connor hearing are from this memo.

"participated in the two 'moot court' sessions . . . primarily asking questions based on past hearings."

Perhaps few nominees were as prepared for their confirmation hearings as was O'Connor, and far fewer people who were not awaiting their confirmation hearings knew as much about them as did Roberts. As his preparation for O'Connor's hearings reflects, short of actually sitting at the table as a nominee before members of the Judiciary Committee, Roberts was a nominee-in-waiting. Twenty years would pass before Roberts took a seat at that table, and during that time period, as novelists like to write, the paper 'trail went cold.' In fact, only one substantive publication exists from Roberts' post-administration service, but that article generated widespread hostility and earned Roberts criticism as an opponent of environmental protection.

The Post-Administration Paper Trail

In 1993, the *Duke Law Journal* published Roberts' article, "Article III Limits on Statutory Standing."[525] Roberts' article reviewed Justice Scalia's majority opinion in *Lujan* v. *Defenders of Wildlife*,[526] and in the article, Roberts agreed with Scalia's position that a plaintiff could not seek relief in a court for an alleged harm caused by the defendant; instead, the plaintiff must prove that an action of the defendant resulted in an actual injury. In the absence of such proof, a court does not have standing to hear the

[525] John G. Roberts, Jr., "Article III Limits and Statutory Standing," *Duke Law Journal* 42 (1993): 1219-1232. For another critical interpretation of Roberts' article, see Paul Alexander Fortenberry and Daniel Canton Beck, "Chief Justice Roberts—Constitutional Interpretations of Article III and the Commerce Clause: Will the 'Hapless Toad' and 'John Q. Public' Have Any Protection in the Roberts Court?" *University of Baltimore Journal of Environmental Law* 13 (2005): 55-94.

[526] 504 U.S. 555 (1992).

plaintiff's case. Roberts' article thus provides a final opportunity to explore his legal reasoning process and to which judicial philosophy he subscribed twenty years after his service in the Reagan and Bush administrations.

Roberts begins his article by providing the necessary framework under which to view the central question in the case. He uses the historical and doctrinal modalities within the original intent perspective to establish that Court precedent has continually reaffirmed the Framer's belief that courts should exercise restraint, and standing is "a constitutionally based doctrine" that preserves the Framer's ideal.[527] According to Roberts' interpretation, the standing doctrine ensures "judicial self restraint" because when a court first determines whether a plaintiff suffered a direct injury from a specific action of the defendant, and therefore has the authority to hear the case, that initial determination "prevents the court from reaching and deciding the merits of the case."[528] Roberts thus incorporates a component of originalism into the prudentialist philosophy, an argumentative strategy that parallels the strategies he used in his previous writings. To bolster his position, Roberts uses wit to point out the consequences of not following prudentialism when deciding a question of standing. As Roberts explains, "[i]t certainly would have been an extraordinary adventure in judicial activism for the Court suddenly to change directions, overrule numerous precedents, and announce, uninvited, that it no longer regarded the injury requirement as an Article III restriction."[529] A close reading of

[527] Roberts, Jr., "Article III Limits," 1220.

[528] Roberts, Jr., "Article III Limits," 1221.

[529] Roberts, Jr., "Article III Limits," 1223.

his article reveals that, contrary to his critics' claims, Roberts does not oppose environmental protections; instead, and consistent with his previous writings, Roberts advances the positivist position that invalid procedures that change the 'rule of recognition' produce invalid rules/laws.

Roberts does concede that courts may face a 'problem of the penumbra' when "defin[ing] injury in some cases . . . , [but] the occasional difficulty of the enterprise is hardly reason to abandon it altogether . . . "[530] For Roberts, the stability and the predictability of the law must subsume the definitional problems with the meaning of 'injury,' and the prudential course is to preserve the validity of the rules/laws.

Roberts also reframes Justice Scalia's opinion as one that was not a Conservative renunciation of environmental laws. In fact, Roberts argues, the doctrine of standing is ideologically neutral. "Standing is an apolitical limitation on judicial power," he writes. "It restricts the right of conservative political interest groups to challenge agency action or inaction, just as it restricts the right of liberal public interest groups to challenge conservative agency action or inaction."[531] With his definitional argument, Roberts attempts to adjust the lens through which people should view Scalia's opinion, and rather than labeling the opinion as an ideological one, people should make an objective assessment of the standing doctrine, for as Roberts suggests, "[t]he consequences of accepting the proposition that injury in fact is not an Article III limitation on federal

[530] Roberts, Jr., "Article III Limits," 1223.

[531] Roberts, Jr., "Article III Limits," 1230.

court jurisdiction ought to give one pause."[532] Again, Roberts demonstrates his prudentialist leanings in the conclusion to his argumentative strategy.

As Roberts did in several of his other writings, he ends where he began—he returns to originalism. Roberts concludes his article with an argument from authority within the historical modality: "The Court's recognition that injury in fact is a requirement of Article III ensures that courts will more properly remain concerned with tasks that are, in Madison's words, 'of a judiciary nature.'"[533] Roberts closing remarks again demonstrate that Roberts incorporates a component of originalism within the prudential philosophy, an approach that remains true to his writings from twenty years earlier.

Preparing for the Call from the Minor League

A review of Roberts' paper trail from his time as a budding law student, to his time as an advocate for the Reagan administration's policies, and after his governmental service provides an initial insight into the judicial philosophy to which Roberts may subscribe. Roberts advances his argumentative strategies through the originalist, positivist, and prudentialist philosophies, though his primary strategies involve incorporating components of originalism and positivism into the prudentialist philosophy. The legal argument 'types' he selects and the modalities in which he uses those 'types' support his prudentialist approach for resolving competing claims over

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[532] Roberts, Jr., "Article III Limits," 1231-32.

[533] Roberts, Jr., "Article III Limits," 1232. Roberts' quote comes from James Farrand, ed., *Madison's Records of the Federal Convention of 1787*, volume 2 (New Haven, CT: Yale University Press, 1966), 72.

statutory and constitutional questions. A review of Roberts' paper trail appears to cast doubt on the claim that Roberts was a 'stealth candidate' when President Bush (43) nominated him for a seat on the Supreme Court. However, to evaluate whether Roberts, as a judge, actually resolved statutory and constitutional questions consistent with the approach he advanced in his pre-court writings requires an examination of his appellate court opinions. The next chapter in the project, therefore, explores this question.

CHAPTER IV

PLAYING IN THE BUSH LEAGUES:

THE APPELLATE COURT TESTIMONY AND OPINIONS

On January 15, 1992, C. Boyden Gray, the Counsel to the President, sent a memorandum to President George H. W. Bush (Bush 41) in which he recommended John Roberts, who at that time worked for the firm Hogan & Hartson, for a position as "United States Circuit Judge for the District of Columbia Circuit."[534] On January 24, the White House's Office of the Secretary issued a "For Immediate Release" statement in which President Bush announced his intention of nominating Roberts to succeed Judge Clarence Thomas for the open appellate court seat, and three days later, Bush sent Roberts' nomination to the Senate.[535] Partisanship ruled the political climate, however, and the Senate failed to act "on the nomination, which lapsed when President Bill Clinton took office." President George W. Bush (Bush 43) re-nominated Roberts for the open seat on the appellate court, but it took another two years until the Senate, on May 8, 2003, confirmed Roberts as a circuit court judge.[536]

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[534] Memo, C. Boyden Gray to George Bush, January 15, 1992, Case No. 314641SS, FG059-01, WHORM: Subject File—General Scanned Records, Bush Presidential Records, George Bush Presidential Library.

[535] White House Press Release, Announcement of John G. Roberts' Nomination, January 24, 1992, Case No. 314641SS, FG059-01, WHORM: Subject File—General Scanned Records, Bush Presidential Records, George Bush Presidential Library.

[536] Wittes, *Confirmation Wars*, 2.

The D.C. Circuit Court of Appeals

Whereas the Supreme Court "cherry-picks only 1% of the 10,000 cases it is petitioned to hear" every year, appellate courts must accept appeals "from almost any loser in federal district court."[537] As a result, the appellate courts "are the final authority on most questions of federal law" and thus are "more powerful and more visible now than ever before."[538] In fact, even though the Supreme Court is the highest and final appellate court in the judicial branch, due to the small number of cases the Court agrees to hear each term scholars argue that "the courts of appeals have become the de facto courts of last resort in the American legal system."[539]

The District of Columbia Circuit Court (hereafter DCC), the twelfth of the regional circuit courts, plays a particularly important role. The DCC "hears appeals from the district court in Washington, D.C., and from federal government agencies,"[540] and as a result, the DCC "enjoys an unmatched reputation as leader in determining the substance and content of administrative law," such as in the "key areas of energy, telecommunications, and environmental and labor regulation."[541] Consequently,

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[537] Jess Bravin, "Change of Venue: In Retirement, Justice O'Connor Still Rules," *Wall Street Journal*, May 4, 2009, A13.

[538] Porto, *May It Please the Court*, 35.

[539] Collins, Jr., and Solowiej, "Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court," 980. Also see Virginia A. Hettinger, Stefanie A. Lindquist, and Wendy L. Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* (Charlottesville: University of Virginia Press, 2006).

[540] Porto, *May It Please the Court*, 36.

[541] Christopher P. Banks, *Judicial Politics in the D.C Court.* (Baltimore, MD: The Johns Hopkins University Press, 1999), 2, 125.

Professor William Fox describes the DCC as "the most powerful circuit court in the nation with respect to the review of the actions of federal agencies,"[542] a result that "enhances its notoriety as a de facto administrative law court."[543] Perhaps most significant, the DCC "has also gained a visible reputation for fostering the development of prospective United States Supreme Court justices, particularly in recent times,"[544] as current Justices Scalia, Thomas, and Ginsburg all served on the DCC prior to taking their seats on the Supreme Court.

Appellate courts seem an appropriate training ground for a seat on the Supreme Court. A panel of nine Justices sits on the Court and all Justices hear the instant case,[545] and at the appellate court level, a panel of three judges usually hears each case. Also similar to the Supreme Court, where the Justices do not preside over trials, appellate court judges do not preside over trials; instead, they hear cases in which "they consider only questions of law, not questions of fact."[546] Professor Britt-Louise Gunnarsson explains the three classes of rules (laws) on which the courts must resolve competing statutory or constitutional questions. The first class, action rules, includes laws involving a right, duty, prohibition, exemption, or recommendation. Action rules focus on a

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[542] Francis J. Flaherty, "Inside the 'Invisible' Courts," *National Law Journal*, May 2, 1983, 24.

[543] Banks, *Judicial Politics in the D.C Court*, 125.

[544] Banks, *Judicial Politics in the D.C Court*, 4.

[545] For some cases, a Justice may recuse himself or herself from hearing the instant case to avoid the appearance of impropriety or to avoid a conflict of interest if that Justice dealt with the case (such as drafting the law at issue in the instant case or hearing the instant case on appeal while a member of an appellate court) prior to assuming a seat on the Court.

[546] Porto, *May It Please the Court*, 36.

framework situation and are symmetrical (apply to two parties) or asymmetrical (apply to one party only). The second class, definition rules, focuses on the content of a statute or its parts and involves a dispute over a definition and its terminological meaning. The final class, stipulation rules, also focuses on a framework situation but instead addresses the domain of the applicability of an entire statute or sections of it.[547] As do the Justices on the Supreme Court, appellate court judges issue a published or unpublished opinion, and the appellate court's decision can affirm the decision of a lower court, reverse the decision in part or in whole, or remand the case for a retrial.[548]

Despite their limited sphere of adjudication, appellate court judges remain an influential body within the legal and political systems. As Law Professor Brian Leiter, for example, argues, "The idea that appellate judges never make law, and only apply the law as written, is a fiction, as every American lawyer knows."[549] In fact, research conducted on appellate court judges' opinions "has found that judicial ideology has a weaker but still prominent impact on decisionmaking [sic],"[550] and that "the judges not only enact *legal* ideological positions but also American *political* ideologies."[551]

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[547] See Britt-Louise Gunnarsson, "Functional Comprehensibility of Legislative Texts: Experiments with a Swedish Act of Parliament," *Text* 4 (1994): 84-86. Also see Vijay Bhatia, "Cognitive Structuring in Legislative Provisions," in *Language and the Law*, ed. John Gibbons, 136-155 (New York: Longman, 1994), 138-139.

[548] Some appellate court opinions also may ask a lower court to clarify its rationale for its decision.

[549] Bravin, "Legal Realism Informs Judge's Views," A3.

[550] Lindquist and Cross, "Empirically Testing Dworkin's Chain Novel Theory," 1173.

[551] Susan U. Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (New York: Oxford University Press, 1998): 79. Italics in original.

If appellate court judges wield such a heavy gavel, and since the DCC appears to be a training ground for future Justices, it seems a worthwhile endeavor to examine how one of the Court's newest Justices transitioned from an advocate for two Republican administrations to a seat on one of the most influential courts in America's judicial system.

This chapter, therefore, follows John Roberts' paper trail to two stops along his route to seat on the Supreme Court. To compose this chapter, I read the complete text of Roberts' appellate court confirmation hearings and I read his 49 published opinions from his two-year tenure as an appellate court judge. The proceeding discussion of both, though, focuses on those aspects of his oral and written testimony and a representative sampling of published opinions that correspond to the subjects and themes on which he wrote letters and memoranda from his time in the Reagan and Bush administrations. Such an approach serves two purposes: first, it allows the project to discern whether Roberts constructed argumentative strategies consistent with those he advanced in his prior writings, and second, it allows the project to evaluate whether Roberts resolved statutory and constitutional questions through one or more judicial philosophies consistent with those he utilized for resolving competing claims while working for the administrations. The project's strategy, therefore, provides the necessary depth for investigating those two questions.

Batting Before the Judiciary Committee

To demonstrate that he was fit for a seat on the appellate court, Roberts had to prove two important facts to the Judiciary Committee: first, that the positions he

advocated for the Reagan and Bush administrations did not represent his personal, ideological views, and second, that he would not enter into a judgeship with preconceptions about how to decide cases.

Early in his hearings, Roberts strove to dispute the notion that he would judge as a Republican extremist who, as Massachusetts Senator Edward Kennedy warned the Committee in his opening statement, endorsed limiting reproductive rights, opposed affirmative action, favored states' immunity from the Environmental Protection Agency's laws, and rigorously defended the Tenth Amendment at the expense of Congress' legislative abilities.[552] Roberts' first opportunity to assuage the Committee's fears occurred during the questioning from Texas Senator John Cornyn, who asked Roberts about the role a lawyer serves for the client. Roberts responded with a two-pronged strategy. Roberts used an argument from authority and an argument from dissociation to reframe the impression of the attorney/client relationship. Roberts replied:

> And there is a longstanding tradition in our country, dating back to . . . John Adams' representation of the British soldiers involved in the Boston Massacre, that the positions a lawyer presents on behalf of a client should not be ascribed to that lawyer as his personal beliefs or his personal positions.[553]

Roberts' reference to one of the leading figures in the Republic's early history uses the well-known 'good versus evil' dissociative dichotomy and serves to cast new light on

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[552] U.S. Congress, Senate, Committee on the Judiciary, *Confirmation Hearing on Federal Appointments,* 108th Congress, 1st session, January 29, 2003: 29 (hereafter cited as *Confirmation Hearing on Federal Appointments*).

[553] *Confirmation Hearing on Federal Appointments,* 71.

the idea that an attorney can represent a reprehensible client. Therefore, just as Americans, especially politicians, do not hold disrepute for Adams, neither should they hold disrepute for Roberts even if they disapproved of his representation of a client whom they disliked. Roberts then moves from the historical to the doctrinal modality to explain his perception of a judge's role, and in so doing, he again displays his positivist and prudentialist leanings. As he explains to Senator Cornyn,

> There's no role for advocacy with respect to personal beliefs or views on the part of a judge. The judge is bound to follow the Supreme Court precedent, whether he agrees with it or disagrees with it, and bound to apply the rule of law in cases whether there's applicable Supreme Court precedent or not. Personal views, personal ideology, those have no role to play whatever.[554]

Roberts restates this same position later, saying, "obviously as [a] judge, I'd follow binding Supreme Court precedent and the precedent in my circuit."[555] Roberts' statements should have provided some reassurance to the Committee, since his explanation on the importance of following precedent, in addition to demonstrating that he recognizes the need for the stability and predictability of the law, also demonstrates that which he opposes: realist judges who fail to exercise restraint. Roberts' answers, however, did not overtly reveal his judicial philosophy.

For many Court followers, nominees should commit, on the record, to which judicial philosophy they will adhere to resolve cases before the Court. If Professor Barnett's claim is correct—that the confirmation hearings for Supreme Court candidates fail to elicit a nominee's judicial philosophy—the same conclusion holds true during

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[554] *Confirmation Hearing on Federal Appointments,* 74.

[555] *Confirmation Hearing on Federal Appointments,* 79.

hearings for appellate court nominees, especially when Committee members directly ask to which philosophy the nominee adheres.[556] Committee Chairperson Patrick Leahy of Vermont, for example, attempted to get Roberts to admit that he followed the originalist philosophy. Leahy discussed an interview Roberts gave to National Public Radio, and Leahy remarked, "you support and [sic] originalist approach to constitutional interpretation." A seasoned veteran of fielding leading questions, Roberts replied, "Well, I think I'd have to say that I don't have an overarching, uniform philosophy." As all lawyers learn very early in law school, never ask a question to which you do not already know the answer. Perhaps Senator Leahy forgot that sage advice, so Roberts capitalized on Leahy's opening. Roberts deftly explained that everyone in the room is a "literal textualist when it comes to a provision of the Constitution that says it takes a two-thirds vote to do something. You don't look at what was the intent behind that, and, you know, given that intent, one-half ought to be enough."[557] Roberts thus reframes Leahy's original intent accusation into the more acceptable literal reading of the Constitution's text regarding the specific directives it gives. To conclude his responses to Leahy, Roberts stated, "I don't have an overarching, guiding way of reading the Constitution. I think different approaches are appropriate in different types of constitutional

[556] See, for example, Jason J. Czarnezki, William K. Ford, and Lori A. Ringhand, "An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court," *Scholarly Works,* Paper 369, April 1, 2007: 127-198. Online at http://digitalcommons.law.uga.edu/fac_artchop/369 (accessed June 20, 2011). The authors conclude that for Supreme Court nominees, "the confirmation hearings are providing very little substantive information as to future judicial behavior." (p. 158).

[557] *Confirmation Hearing on Federal Appointments,* 253.

provisions."[558] Leahy did not ask what those "appropriate" approaches were, so Roberts' positivist and prudentialist perspectives went unexplored, and he did not strike out in his first at-bat against a formidable pitcher.

In addition to testifying before the Judiciary Committee, nominees receive both a pre-hearing questionnaire and a post-hearing, follow-up questionnaire to which they respond to written questions the Senators submit to the nominees. Roberts' oral responses to Senator Leahy's questions paralleled the written responses he provided to New York Senator Charles Schumer's follow-up questionnaire. Initially, Roberts' outlined his theoretical approach to constitutional interpretation:

> My own judicial philosophy begins with an appreciation of the limited role of a judge in our system of divided powers. Judges are not to legislate and are not to execute the laws. . . . My judicial philosophy accordingly insists upon some rigor in ensuring that judges properly confine themselves to the adjudication of the case before them, and seek neither to legislate broadly nor to administer the law generally in deciding that case.[559]

Roberts then provided an explanation of the process he would use to decide a case:

> Deciding the case calls for . . . adherence to precedent and reliance on the traditional tools of the judicial craft, and an openness to the wisdom offered by colleagues on a panel. It also requires an essential humility . . . reflected in doctrines of deference to legislative policy judgments and embodied in the often misunderstood term "judicial restraint." That restraint . . . means that judges should not look to their own personal views or preferences in deciding the cases before them. Their commission is no license to impose those preferences from the bench.[560]

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[558] *Confirmation Hearing on Federal Appointments,* 254.

[559] *Confirmation Hearing on Federal Appointments,* 437.

[560] *Confirmation Hearing on Federal Appointments,* 437.

Roberts' written responses to Senator Schumer's questions, in essence, *do* outline his legal reasoning process and his judicial philosophy, and his statements are important both for what they include as well as what they exclude. Roberts' use of both an argument from coherence and an institutional argument reveal his positivist and prudentialist tendencies. Judges should respect precedent, recognize that their 'breadth of judicial authority is limited,' avoid 'bold forays into policy-making,' and exercise 'modesty and humility'—all hallmarks, according to Professor Breen, of the prudentialist jurist. Judges should exercise judicial restraint, adhere to the 'rule of recognition,' and defer to others' valid rules and valid rule-making and rule-changing—all hallmarks of the positivist judge, according to Professor Hart. At the same time, Roberts excludes the realist and pragmatist judges from his definitions, since both philosophies involve an element of judicial activism and judge-made law.

Which philosophy would a Judge Roberts use, positivism or prudentialism? Roberts provides some insight into that question in his written response to Senator Kennedy's follow-up questions:

> I do not have an all-encompassing approach to constitutional interpretation; the appropriate approach depends to some degree on the specific provision at issue. Some provisions of the Constitution provide considerable guidance on how they should be construed; others are less precise. I would not hew to a particular "school" of interpretation but would follow the approach or approaches that seemed most suited in the particular case to correctly discerning the meaning of the provision at issue.[561]

[561] *Confirmation Hearing on Federal Appointments,* 434.

Based on Roberts' answer, what "school" or interpretive approaches he would use remains a mystery at this point, one that a further investigation into his paper trail may answer.

When batters are ahead in the pitch count with three balls and no strikes, they know the pitcher must throw a ball across the middle of home plate to get that first strike. Senator Schumer, one of the most outspoken and angry members of the Judiciary Committee who wanted more on Roberts' paper trail, knew he needed to throw a strike to Roberts. Schumer, therefore, asked Roberts a straightforward written question: "If confirmed, what Supreme Court Justice, living or dead, would you most want to emulate in terms of judicial philosophy or approach to constitutional questions?" Roberts expected the pitch and his response probably further angered the senator:

> There is no Supreme Court Justice I would seek to emulate in terms of judicial philosophy or approach to constitutional questions. As a general matter, I admire the judicial restraint of Holmes and Brandeis, the intellectual rigor of Frankfurter, the common sense and pragmatism of Jackson, the vision of John Marshall. But I would not say there is one Justice's judicial philosophy that I would strive to copy. The reason is that I do not believe that beginning with an all-encompassing, categorical judicial philosophy or uniform approach to constitutional questions is the best way of faithfully construing the Constitution.[562]

Consider the Justices that Roberts lists: Oliver Wendell Holmes, a realist/pragmatist; Louis Brandeis, a pragmatist; Felix Frankfurter, a staunch defender of judicial restraint who voted with the majority in *Brown* v. *Board of Education*; Robert H. Jackson, an ardent supporter of individual rights but who vehemently opposed the Court's realist

[562] *Confirmation Hearing on Federal Appointments,* 437-438.

Justices, and he, too, voted with the majority in *Brown*; and, Chief Justice John Marshall, a Federalist whose decisions demarcated the powers of the executive and legislative branches. Roberts' list reads as a "Who's Who" of famous and well-respected Supreme Court Justices, yet he would not agree with all of their judicial philosophies; instead, he selects the best jurisprudential tendencies (in his view) of the Justices, and as he demonstrated in his prior writings, Roberts selects the best components of the Justices' philosophies and incorporates them into his own interpretive approach, which is consistent with the prudentialist philosophy.

Senator Schumer also asked Roberts to "define judicial activism." Again, Roberts advocated a role of judicial restraint for judges and expressed his respect for the separation of powers doctrine:

> I understand "judicial activism" to refer to a judge who has transgressed the limited role assigned to the judicial branch under the Constitution, and has either undertaken to exercise the legislative function by imposing his own personal policy preferences under the guise of legal interpretation, or has arrogated to himself the executive function by imposing his policy views of how the law should be administered.[563]

Again, Roberts uses the structural modality within the prudential philosophy to clarify what he views as acceptable and unacceptable interpretive approaches: judges are not realists who possess the authority or power to exceed their constitutional directive to adjudicate rather than legislate, and he rejects the pragmatist and realist philosophies, which encourage judge-made rules/laws. Roberts' response to Senator Schumer also parallels a similar response he provided to Senator Leahy's pre-hearing written

[563] *Confirmation Hearing on Federal Appointments,* 439.

questions. Roberts offered an institutional argument within the structural modality to explain his approach to "statutory interpretation," and at the same time he excluded a key precept of the originalist position, which is that judges should not consider legislative history or intent when resolving competing claims over the meaning or interpretation of a word. As Roberts explained,

> The Supreme Court has provided ample guidance on how to engage in statutory interpretation. The task begins, of course, with the language chosen by Congress. . . . The process by which the statute evolved – its legislative history – is an appropriate source for guidance in construing ambiguous statutory language.[564]

By recognizing that legislative history can play an integral role in a judge's resolution of the instant case, Roberts signals that he rejects a 'pure' originalist doctrine and the technician/mechanical approach advocated by the formalist philosophy. Roberts' answers allowed him to safely round the bases after facing two more Democratic Senators who took the mound.

Roberts never hit the proverbial "home run" with one of his answers. He successfully guarded the plate, and he hit safely often enough that the Committee members could not report that Roberts was a Conservative ideologue or an extremist who posed a threat to American's rights and values. While Roberts never conveyed specifically how he would decide a particular controversy before the court, he did provide insight into how he viewed certain statutory and constitutional issues that could be the focus of an instant case.

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[564] *Confirmation Hearing on Federal Appointments,* 449-450.

Civil Rights, Take II

With fears high that a Judge Roberts would curb efforts to protect individual rights, several senators queried Roberts on his views about the issue. One notable effort involved Illinois Senator Richard Durbin's criminology lesson, in which he discussed the problems with racial profiling, minimum mandatory sentencing, and the statistical disparities for drug use and convictions. Durbin identified the alarming arrest and incarceration percentages for African-Americans versus other races. Roberts conceded that "that sort of statistical disparity ought to spark further inquiry," but he refused to adopt the realist or pragmatist position and concede that the courts or judges should be the ones to act on and resolve the disparities. Roberts instead reframed the issue and he offered his interpretation on the role that due process and equal protection play in any 'individual-group' assessment. According to Roberts, "treating people as individuals . . . is sort of at the core of our constitutional liberties, that we don't group people according to characteristics. . . . We treat people as individuals." According to Roberts, "no matter how compelling the statistical evidence . . . that's not what due process means, that's not what liberty means, that's not what the various protections of the Bill of Rights means."[565] Roberts uses dissociation to reframe the issue from a disadvantaged/advantaged group concern to one in which all people are treated equally under the law, and legislatures—not judges—are responsible for correcting the deficiencies with laws, especially those laws that inadvertently promote discrimination.

[565] *Confirmation Hearing on Federal Appointments,* 249.

As Senator Durbin pressed the issue with further questions, Roberts drew the proverbial 'line in the sand' regarding whether judges or Congress should address the unfair or unjust sentencing guidelines. Mandatory minimum sentencing, Roberts explained, is "a quintessential legislative policy judgment, what the sentence for a crime is going to be and whether a judge is going to have discretion in sentencing or whether there's going to be a mandatory minimum. I know there are constitutional issues at the margin . . . but it's a policy judgment."[566] For Roberts, despite the 'problem of the penumbra,' any racial disparities in sentencing cannot be attributed to judges, who only interpret the laws (guidelines) made by Congress; if a problem exists, Congress, as the legislative branch, possesses the policy-making responsibility and it must either enact a statute that reforms the system or enact a statute that provides guidance for judges when they impose a sentence to an individual convicted of a drug crime. Roberts' argument from coherence within the structural modality reaffirms his views on the proper separation of powers between the legislative and the judicial branches, and he again interprets the issue through a positivist and prudentialist lens.

A little discussed topic for Roberts' jurisprudence involved the Fourth Amendment and how to define a 'reasonable search and seizure.' In 1983, Roberts wrote a "Talking Points" memorandum on the Court's decision in *United States* v. *Leon*,[567] a

[566] *Confirmation Hearing on Federal Appointments,* 250.

[567] 468 U.S. 897 (1984).

decision which held that there is a "good faith" exception to the exclusionary rule.[568] In his memo, Roberts outlined one of the benefits of the decision for law enforcement officers:

> The Court has held today that there can be no deterrence in situations where reasonably well-trained police officers believe that they are acting according to the law. You cannot deter police officers from making mistakes when reasonably well-trained police officers in their positions would have believed that they were acting in accordance with the law.[569]

One of the only references to the Fourth Amendment came during Senator Leahy's questioning. When answering whether he adhered to an originalist philosophy, Roberts explained that "there are certain areas where literalism along those lines obviously doesn't work. If you are dealing with the Fourth Amendment, is something an unreasonable search and seizure, the text is only going to get you so far."[570] Roberts' answer does not signal under which philosophy he would evaluate the reasonableness of a search; instead, he only expresses that a literal interpretation of the Constitution's text would not resolve the competing claims. Roberts does suggest, however, that a prudentialist approach may guide his resolution of a search and seizure case, as a prudentialist judge has the 'acute recognition' that laws and regulations should not hamper nor hamstring the ability of actors (such as law enforcement officers) to perform effectively their duties and tasks.

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[568] In a 6-3 decision, the Court held that the exclusionary rule exists to deter illegal police conduct, not to disallow the admission of evidence into a trial that the police acquired through a mistakenly issued search warrant.

[569] Memo, John G. Roberts to T. Kenneth Cribb, Jr., January 4, 1983, folder "JGR/Exclusionary Rule (1)," Box 24, John G. Roberts Files, 1982-1986, Ronald Reagan Library.

[570] *Confirmation Hearing on Federal Appointments,* 254.

A third topic which concerned the Committee was Roberts' defense in a Title IX discrimination case. In the general pre-hearing questionnaire responses he submitted to the Committee, Roberts discussed a position he advocated for the National Collegiate Athletic Association (NCAA) before the Court.[571] The NCAA, which retained Roberts to argue before the Court, sought review on whether Title IX of the Education Amendments of 1972 applied to the NCAA. Title IX guidelines apply to organizations which receive federal funding from the government, and the Third Circuit Court held that Title IX applied to the NCAA since it received dues payments from its member schools. In his written response, Roberts offered a definitional argument to alter the meaning associated with receiving financial assistance. As Roberts explained, Title IX "applies only to organizations that receive federal financial assistance," and that "hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent."[572] In his response, Roberts explained the position he advocated for the NCAA before the Court; at the same time, though, he also explained his statutory interpretation of Title IX as well as his interpretation of the Supreme Court's line of precedents regarding contract theory and Congress' Spending Clause powers. According to Roberts, "entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding – those who knowingly entered into a bargain by accepting the funding – and does not

[571] See *National Collegiate Athletic Association* v. *Smith*, 525 U.S. 459 (1999).

[572] *Confirmation Hearing on Federal Appointments,* 314.

'follow [] the aid past the recipient to those who merely benefit from the aid.'"[573] Similar to the approach he took in his memoranda, Roberts uses a quasi-dissociative argument and a definitional argument to reframe the issue: direct governmental aid and indirect institutional aid serve distinct and different purposes, and Title IX requirements only apply to the direct recipient of federal aid; institution-provided aid (such as dues) is not federal aid, and therefore Title IX requirements do not extend to indirect recipients.

The Environment, Take II

Despite the Committee's concerns that they lacked a complete record of Roberts' paper trail, Roberts did indirectly encourage them to follow his trail to the article from the *Duke Law Journal*. On the general questionnaire responses he submitted to the Committee prior to the start of his hearings, Roberts identified as one of "the ten most significant litigated matters which [he] personally handled" the *Lujan* v. *National Wildlife Federation* case.[574] While serving as the Acting Solicitor General, Roberts wrote, he "participated in the briefing on the merits and presented oral argument [before the Supreme Court] on behalf of the government."[575] The Committee questioned Roberts on his perceived opposition to environmental protections, and Roberts rephrased his earlier 'John Adams defense' to address the concern. Roberts explained during his oral testimony that the Committee should not infer from his written response that he personally held the position that he advocated before the *Lujan* Court, and he provided a

[573] Citing *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986): 607. *Confirmation Hearing on Federal Appointments*, 314-315.

[574] 497 U.S. 871 (1990). *Confirmation Hearing on Federal Appointments*, 312.

[575] *Confirmation Hearing on Federal Appointments*, 312.

very brief summary of the standing doctrine he defended in the *Lujan* v. *National Wildlife Federation* case. As Roberts explained,

> We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5 – 4 decision, agreed with our analysis.[576]

Roberts' interpretation of the standing doctrine in *Lujan* v. *National Wildlife Federation* parallels his interpretation of the standing doctrine in *Lujan* v. *Defenders of Wildlife*, the case on which he wrote about in the *Duke Law Journal* article. In both *Lujan* cases, Roberts defended the position that since the plaintiffs failed to prove that a direct action of the defendant caused an actual harm (rather than an alleged harm), the plaintiffs lacked standing to sue, and therefore the Court lacked the authority to rule on the merits of the case.

Roberts also received a follow-up question from Wisconsin Senator Russell Feingold on the environment topic. The Senator asked Roberts whether he thought "the courts should be more or less accepting of environmental regulation under the takings clause?" Roberts offered a pat answer within the doctrinal modality, and he wrote that he "would be bound to follow that precedent whether I personally regarded it as overly accepting or insufficiently accepting of environmental regulation." Roberts excludes the realist and pragmatist perspective as approaches for relaxing or strengthening environmental protections via judge-made law, and he instead provides a positivist response to the Senator's question.

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[576] *Confirmation Hearing on Federal Appointments,* 313.

During the actual confirmation hearings, however, none of the Committee members questioned Roberts on his environmental views. While Roberts provided the Committee an opportunity to explore his defense of the standing doctrine, no substantive questions explored either his pre-hearing written response or his *Duke Law Journal* article. As a result, the Roberts-as-environmental-foe fears subsided without incident, and Roberts' stance on environmental protection became a moot point.

Getting the Call to the Bush League

As his confirmation hearings demonstrate, Roberts survived the sliders, curveballs, and occasional fastballs that the Committee threw to him. Roberts proved to be a formidable foe at the plate, and he followed the advice he gave to Justice O'Connor and Roberts thus avoided a Bork-like disaster or a Thomas-like inquiry that could have permanently derailed his bid for a seat on the appellate court. While some critics still opposed Roberts' confirmation, other supporters, such as Neal Kumar Katyal, then a visiting professor of law at Yale Law School but who now holds the Deputy Solicitor General position in the Obama administration, submitted letters of recommendation for Roberts' appointment to the court.[577] Ultimately, after waiting 11 long years for a judgeship, the Senate Judiciary Committee voted 16 to 3 to confirm Roberts,[578] and the full Senate, in a voice vote and without opposition, confirmed Roberts on May 8, 2003, for the open seat on the District of Columbia Circuit Court of Appeals.[579]

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[577] For Katyal's letter to Senator Leahy, see *Confirmation Hearing on Federal Appointments,* 625-626.

[578] Page and Kiely, "Praise on One Side; Questions on the Other," 6A.

[579] Toobin, *The Nine*, 264.

The Appellate Court Opinions

Professor Michael Comiskey argues that neither the "published opinions of former federal judges" nor "the record of even a highly experienced federal appeals court judge" provide much insight into that judge's judicial philosophy.[580] Many Court followers appear to agree with Comiskey's claim. One person, for example, wrote that as an appellate court judge, Roberts remained "something of an ideological mystery" since "[t]he 49 opinions he's written . . . reveal little of his leanings on issues important to conservatives, such as abortion and school choice."[581] This project contends, however, that a close reading of Judge Roberts' published appellate court opinions reveals insight into the judicial philosophy to which he adheres to resolve competing claims over constitutional and statutory questions. The remainder of the chapter, therefore, examines a representative sampling of Judge Roberts' opinions to discern whether he constructed argumentative strategies consistent with those he advanced in his prior writings and confirmation hearing testimony, and whether his decision-making and resolution of the cases for which he wrote opinions provide additional insight into a judicial philosophy to which he subscribes.

Wit and Wisdom, Take II

As he did in his memoranda while serving in the Reagan administration, Roberts displayed his sharp wit in several of his appellate court opinions. In some opinions,

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[580] Comiskey, "Can the Senate Examine the Constitutional Philosophies of Supreme Court Nominees?" 498.

[581] Vincent, "Roberts Rules," 13.

Roberts used wit to frame the facts of the case, and in other opinions he used wit to advance an argument or to make a point regarding statutory questions.

Roberts introduced several cases with humorous historical or literary references. For example, *Consumers Energy Company* v. *Federal Energy Regulatory Commission*[582] concerned the legality of a tariff scheme for energy transmission services across the Canada-United States border. Roberts explained the origins for the statutory issue:

> It was a close thing, but Benedict Arnold's bold plan to capture Canada for the Revolution fell short at the Battle of Quebec in early 1776. As a result, the Federal Energy Regulatory Commission must now decide when affiliates of Canadian utilities – utilities not subject to FERC jurisdiction – may sell power at market-based rates in the United States.[583]

In *Jung* v. *Mundy, Holt, & Mance, PC*,[584] a case which involved estate planning and alleged legal malpractice, Roberts turned to Charles Dickens' 1853 novel to highlight the ongoing conflict between the parties.

> The roots of this real-life *Bleak House* saga doubtless stretch further back in time, but the precipitating event was the death of Lew Gin Gee Jung (Mother Jung) in January 1985.

Roberts' use of wit in both cases might draw disdain from those who oppose the use of 'rhetorical excesses,' such as humor, in judicial opinions,[585] even when that humor is

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[582] 367 F.3d 915 (D.C. Circ., 2004). I used the Library of Congress website (http://www.loc.gov/law/find/roberts.php) to access the complete texts of Judge Roberts' D.C. Circuit Court published opinions, as that website provided a complete record of the 49 opinions Judge Roberts authored, and the Library of Congress website posted the opinions for review prior to Judge Roberts' Supreme Court confirmation hearings. Unless otherwise indicated, all page numbers for an appellate court opinion from Judge Roberts are from the opinions on that website.

[583] 367 F.3d 915 (D.C. Circ., 2004): 2.

[584] 372 F.3d 429 (D.C. Circ., 2004).

"genuinely relevant to the case at hand,"[586] as Roberts' humor was. Benedict Arnold attempted to blockade Quebec, and the tariffs in *Consumers Energy* served as a blockade against the Canadian transmission of energy into the northern United States. Dickens' novel concerned the long-running litigation over a will, the central issue in *Jung*. Roberts' wit and humor, rather than detracting from the importance of the opinion, actually serve a purpose in his writing, similar to how his humor and wit in his Reagan-era memoranda served a purpose.

Roberts, though, also used wit to frame statutory issues. In *Duchek* v. *National Transportation Safety Board and Federal Aviation Administration*,[587] in which the court held that the NTSB and the FAA violated their precedent for random, unannounced drug testing and violated "the text and purpose of the [drug testing] regulations,"[588] Roberts used a sports analogy to explain the importance of the consistent application of the 'rule of recognition' for testing aviation employees. As Roberts wrote,

> A sport such as golf can have a system of rules grounded on the assumption that participants will in good faith call penalties on themselves, but such an approach

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[585] As William Prosser, for example, argued in 1952, "Judicial humor is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a judge utter a good one. . . . In the second place, the bench is not an appropriate place for unseemly levity." William L. Prosser, *A Collection of Judicial Opinions and Other Frivolities*, 2nd ed. (New York: Fred B. Rothman Publications, 1999), vii. Also see J.T. Knight, "Humor and the Law," *Wisconsin Law Review* 1993 (1993): 897-919, and Marshall Rudolph, "Judicial Humor: A Laughing Matter?" *Hastings Law Journal* 41 (1989): 175-200.

[586] George Rose Smith, "A Critique of Judicial Humor," *Arkansas Law Review* 43 (1990): 8. For other scholars who discuss the relevance of humor within the judicial opinion, see Jordan, "Imagery, Humor, and the Judicial Opinion," 693-727; Susan K. Rushing, "Is Judicial Humor Judicious?," *Scribes Journal of Legal Writing* 1 (1990): 125-142; and, Villy Tsakona, "Humor and Image Politics in Parliamentary Discourse: A Greek Case Study," *Text & Talk* 29 (2009): 219-237.

[587] 364 F.3d 311 (D.C. Circ., 2004).

[588] 364 F.3d 311 (D.C. Circ., 2004): 12.

> seems ill-advised when it comes to designing regulations to protect the public from drug use by those in safety-sensitive positions – and in fact that is not the approach reflected in these regulations.[589]

Roberts' prudentialist reasoning argues that the risk to allowing an individual, who knows he was selected for a 'random' drug test and knows he must schedule that test for himself, potentially threatens the safety of airline passengers if the randomness and the element of surprise are no longer criteria for drug testing. In such a situation, deferral to agency decision-making is neither a wise nor a prudent decision, as the potential costs (less safety) outweigh the benefits to deferral.

In several other opinions Roberts used his wit via metaphors to advance or conclude arguments about the appropriate interpretation of a statute.[590] For example, in *Independent Equipment Dealers Association* v. *Environmental Protection Agency*,[591] Roberts explained with a context-specific metaphor (hence the grammatical error in his quip below) that the EPA did not change the 'rule of recognition' for heavy construction equipment dealers as "the EPA Letter tread no new ground. It left the world just as it found it . . . "[592] In an opinion issued a month after the *Independent Equipment* decision, Roberts again utilized a transportation metaphor, though he extended this metaphor throughout his opinion. *Midwest ISO Transmission Owners* v. *Federal Energy*

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[589] 364 F.3d 311 (D.C. Circ., 2004): 9.

[590] On the use of metaphors as "a strategic and purposive form of argument," (p. 376) see Donna L. Dickerson, "<Freedom of Expression> and Cultural Meaning: An Analysis of Metaphors in Selected Supreme Court Texts," *Communication Law & Policy* 1 (1996): 367-395.

[591] 372 F.3d 420 (D.C. Circ., 2004).

[592] 372 F.3d 420 (D.C. Circ., 2004): 14.

Regulatory Commission[593] involved a cost-trapping claim for realizing fees incurred for the use of energy transmission lines (i.e. energy "transportation" lines). Critics of the opinion would characterize it as one filled with complex jargon and a lot of law-talk terminology; Roberts might agree, but he would counter that the opinion demonstrates his attempt at making the opinion more readable, as he intersperses more recognizable "transportation" metaphors throughout the opinion. Roberts opens the opinion with the statement "In the bad old days," and then he "drives" the reader through the case. As the reader travels through the opinion, the reader arrives "at some point down the road," traverses "jurisdictional speed bumps," encounters "transmission loads wheeled across" energy facilities, but in the end the reader finds that Midwest "gain[ed] no traction in their argument."[594] Rather than reading Roberts' *Independent Equipment* and *Midwest ISO* opinions as exemplars of all that is wrong with legal rhetoric, a more objective approach is to view the opinions as examples of Roberts' deliberate use of a rhetorical device to strengthen his argumentative strategy for resolving competing claims about a statute.

The Statute is the Key for Unlocking the Rule of Law

After law school, Roberts secured a clerkship at the U.S. Court of Appeals in New York. Roberts clerked for the man who became his "role model," Judge Henry Friendly, whom legal scholars regard "as perhaps the greatest appeals-court judge of the

[593] 373 F.3d 1361 (D.C. Circ., 2004).

[594] 373 F.3d 1361 (D.C. Circ., 2004): 1, 9, 10, 11, and 12. Each metaphor is from those pages, respectively.

20th century."[595] Roberts, it seems, deeply respected the humility and the wisdom Judge Friendly used to resolve constitutional and statutory questions, and Roberts "cited [Judge] Friendly by name in six cases."[596] Roberts' reference to Judge Friendly in the case *In re England*[597] reflects how Judge Friendly's approach to deciding cases guides Roberts in his own decision-making. As Roberts explained in his opinion,

> . . . the statute, by its terms, applied only to certain types of selection board proceedings. This calls to mind what Judge Friendly described as Felix Frankfurter's "threefold imperative to law students" in his landmark statutory interpretation course: "(1) Read the statute; (2) read the statute; (3) read the statute!"[598]

Judge Friendly's temperament and Justice Frankfurter's admonition best describe the approach that Roberts takes to resolve competing claims over action, definition, or stipulation rules, as evidenced by his appellate court opinions: Roberts reads the text of the statute, he identifies the 'rule of recognition,' and he lets that guide his resolution of the case.

Consistent with Judge Friendly and Justice Frankfurter's advice, Roberts proceeds to resolve many of his cases by turning to the text of the statute, and he employs a two-step process for resolving statutory questions. First, he begins his

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[595] Thomas and Taylor, Jr., "Judging Roberts," 27.

[596] Thomas and Taylor, Jr., "Judging Roberts," 28.

[597] *In re: Gordon R. England*, 375 F.3d 1169 (D.C. Circ., 2004).

[598] 375 F.3d 1169 (D.C. Circ., 2004): 21. Roberts references Henry J. Friendly, *Benchmarks* (Chicago, IL: University of Chicago Press, 1967), 202. For other references to Judge Friendly, see *LeMoyne-Owen College* v. *National Labor Relations Board*, 357 F.3d 55 (D.C. Circ., 2004); *PDK Laboratories, Inc.* v. *United States Drug Enforcement Agency*, 362 F.3d 786 (D.C. Circ., 2004); and, *United States of America ex rel. Totten* v. *Bombadier*, 380 F. 3d 488 (D.C. Circ., 2004).

reasoning by focusing on the actual meaning of the words or phrases as they are used within the statute. Second, and consistent with the explanation he gave during his confirmation hearing testimony, he cites Supreme Court precedent and uses the doctrinal modality to signal the process by which his reasoning will follow. Roberts' two-step approach is consistent with the *Chevron* doctrine, a two-part framework the Supreme Court outlined in its decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*.[599] Under the *Chevron* framework, courts must decide first whether Congress has 'spoken directly to the question at issue,' and if they have, then courts must defer to Congress' statutory intent; second, if the statute is 'silent' on the issue of intent, then courts must defer to an agency's interpretation of the statute, as long as that interpretation is reasonable and not "an action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," the standard codified in the Administrative Procedure Act of 1988.[600] A review of some of Roberts' opinions outlines his legal reasoning procedure, his application of the *Chevron* doctrine, and the prudentialist approach he uses to resolve competing claims.

Roberts often opens the section of the opinion in which he explains the rationale behind the court's holding with a simple statement about where the court should begin

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[599] 467 U.S. 837 (1984). This project does not critique every decision in which Roberts discussed and applied the *Chevron* doctrine. However, for additional cases that fall within this project's assessment of Roberts' application of the *Chevron* doctrine, see, for example, *American Federation of Labor and Congress of Industrial Organizations* v. *Chao*, 409 F.3d 377 (D.C. Circ., 2005), and *Amoco Production Company* v. *Watson*, 410 F. 3d 722 (D.C. Circ., 2005). For more on the *Chevron* doctrine, see William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York: New York University Press, 2007), 112.

[600] 5 USC 706(2)(A).

its resolution of the case. For example, *Consumer Electronics Association* v. *Federal Communications Commission*[601] answered whether the FCC had the authority to require manufacturers of televisions with a thirteen inch or greater display screen to include tuners on the televisions that would enable the televisions to receive and decode digital television signals. Roberts quotes a previous D.C. Circuit Court decision, *Citizens Coal Council* v. *Norton*, to begin his rationale for the *Consumer Electronics* court's decision: "We begin, as always, with the plain language of the statute in question."[602] In another case, Roberts omits any reference to a prior decision, but he uses similar language to introduce the court's rationale. *In re England* addressed whether a congressional statute specifically barred, to any non-board member, the disclosure of information about the proceedings of a naval selection board. To introduce the rationale for the court's decision, Roberts wrote, "[w]e begin with the plain language of the statute in question."[603] Roberts' approach serves two purposes: first, by starting with the statutory text, Roberts demonstrates that the court followed the 'rule of recognition' rather than engaged in judicial policy-making, and second, he demonstrates that the court exercised judicial restraint and focused on the statutory question rather than decided the merits of the case based on his (or the panel's) preconceptions. Roberts also advances this positivist and prudentialist perspective in his *PDK Laboratories Inc.* v. *United States*

[601] 347 F.3d 291 (D.C. Circ., 2003).

[602] 330 F.3d 478 (D.C. Circ., 2003): 482. Cited in *Consumers Electronics Association* v. *FCC*, 347 F.3d 291 (D.C. Cir 2003): 10.

[603] 375 F.3d 1169 (D.C. Circ., 2004): 13.

Drug Enforcement Administration opinion.[604] Roberts concurred in part and concurred in the judgment, and his opinion serves as one of the clearest examples of his belief that judges should exercise judicial restraint. As Roberts explains in introducing the rationale for his decision,

> [T]he cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more – counsels us to go no further.
>
> My brethren, however, are not content with this narrow and effectively conceded basis for disposition, and instead adopt an alternative ground of far broader significance . . . I cannot go along for that gratuitous ride.[605]

The substance of Roberts' opinions also reflects his prudentialist commitment to judicial restraint as well as his belief that the separation of powers doctrine precludes judges from making the law. As he explains in *In re England*, "we are reluctant to imply an additional exception,"[606] a restraint he justifies by citing the Supreme Court's decision in *United States* v. *Johnson*: "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others."[607] Roberts advances his position on judicial restraint with an institutional argument within the structural and doctrinal modalities. Even with the absence of congressional or Court guidance, though,

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[604] 362 F.3d 786 (D.C. Circ., 2004).

[605] 362 F.3d 786 (D.C. Circ., 2004): 1. To conclude his opinion, Roberts quotes Justice Frankfurter's opinion for the *Whitehouse* Court: "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse* v. *Illinois Central Railroad Company*, 349 U.S. 366 (1955): 372-373.

[606] 375 F.3d 1169 (D.C. Circ., 2004): 14.

[607] 529 U.S. 53 (2000): 58.

Roberts still argues for judicial restraint. In *United States* v. *Stanfield*,[608] the defendant questioned the district court's imposition of unclear sentencing guidelines regarding his ability to access the internet. Rather than take the opportunity to correct the district court's sentencing stipulations, Roberts emphasizes that the issue demands judicial restraint. As Roberts explained,

> We are reluctant to address the validity of the internet restriction in the absence of a clearer understanding of its scope; we need more footing before deciding where we stand . . . the confusion over the scope of the internet restriction counsels restraint on our part before attempting to consider the validity of the restriction under 18 U.S.C § 3583 and the First Amendment.[609]

Roberts' use of the prudential modality within the prudentialist perspective also reflects his incorporation of a component of positivism into his decision-making calculus: he recognizes that the district court has not clarified the 'rule of recognition' under which it imposed restrictions, though he assumes that a valid rule exists. Both positivism and prudentialism, however, preclude an appellate court judge from correcting the problem with the law.

Roberts' prudentialist approach also allows him to cite Supreme Court precedent in cases in which the court need not consider legislative history or intent. In *Consumer Electronics*, for example, Roberts uses the doctrinal modality and explains that "the Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application,"[610] and he quotes the Court's

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[608] 360 F.3d 1346 (D.C. Circ., 2004).

[609] 360 F.3d 1346 (D.C. Circ., 2004): 19.

[610] 347 F.3d 291 (D.C. Circ., 2003): 10-11.

decision in *Ratzlaf* v. *United States*[611] to further impress his point: "We should 'not resort to legislative history to cloud a statutory text that is clear.'"[612] At the same time, however, Roberts' prudentialist approach to resolving statutory questions reveals that, consistent with his confirmation hearings' testimony, he breaks from the formalist and originalist contention that judges should not consider legislative history or intent when deciding the instant case. Roberts noted in his *In re England* opinion, for example, that the court found that the limited legislative history "fully comports with our plain language reading, and that nothing in that history remotely suggests that Congress intended an unexpressed exception to the ban on disclosure for civil discovery."[613]

Roberts often, in fact, staunchly defends his prudentialist belief that judges must defer to Congress' statutory intent. *Acree* v. *Republic of Iraq*[614] involved the 1961 Foreign Assistance Act's prohibition on providing aid to countries that sponsor terrorism and whether a post-Saddam Hussein Iraq could receive economic assistance. Roberts filed an opinion that concurred in part and concurred in the judgment, and his opinion addressed the majority's failure to appropriately 'read' Congress' intent for the Emergency Wartime Supplemental Appropriations Act (EWSAA), which authorized providing assistance to post-terrorist states. In his opinion, Roberts included the *Ratzlaf* quote and he cited his *Consumer Electronics* opinion to establish that courts must defer

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[611] 510 U.S. 135 (1994).

[612] 347 F.3d 291 (D.C. Circ., 2003): 13. Roberts quotes 510 U.S. 135 (1994): 147-148.

[613] 375 F.3d 1169 (D.C. Circ., 2004): 15.

[614] 370 F.3d 41 (D.C. Circ., 2004).

to Congress' broad statutory intent. As Roberts explained in *Acree*, "Congress knows how to use more limited language . . . when it wants to. Congress did just that in another appropriations [sic] statute enacted just two months prior to the EWSAA."[615] Roberts made a similar argument in *United States of America ex rel. Totten* v. *Bombadier,*[616] a case that involved Amtrak's payment for allegedly defective rail cars. As Roberts explained in his opinion, "if the overriding intent of Congress were in fact to delete the requirement that claims be presented to a Government officer or employee, Congress could readily have done just that. . . . But Congress did not . . . "[617] Roberts' arguments by analogy within the structural modality reflect his prudentialist belief that judges possess limited authority and that they should defer to the decision-making of others.

Roberts' appellate opinions also demonstrate that he defers to the agencies tasked with carrying out the rules/laws on which the case centers. By so doing, Roberts recognizes that a 'rule of recognition' guides his decision-making, and that he should defer both to valid rules/laws and to valid rule-making and rule-changing procedures. Roberts' positivist approach thus corresponds with his prudentialist belief that judges should exercise judicial restraint rather than make or change the law, as a realist or pragmatist judge might do.

As with his deference to Congress' intent, Roberts bases his deference to agency decision-making on the 'rule of recognition' contained within the text of a statute. In

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[615] 370 F.3d 41 (D.C. Circ., 2004): 1.

[616] 380 F. 3d 488 (D.C. Circ., 2004).

[617] 380 F. 3d 488 (D.C. Circ., 2004): 11.

Bloch v. *Powell*,[618] for example, the plaintiff raised a due process claim and argued that it was beyond the Secretary of State's discretion to withhold Bloch's immediate retirement annuity. In his opinion, Roberts offers an institutional argument and an argument from coherence to explain that "Bloch concedes that Section 811 of the [Foreign Service] Act [of 1980] vests the Secretary with significant discretion – as indeed he must. The statute is perhaps a paradigmatic vesting of unfettered discretion, placing no constraints on the Secretary's authority to withhold consent."[619] Roberts later notes in his opinion that "discretion [is] the touchstone of the due process analysis in the property context," and as such "[t]he Secretary's broad discretion to withhold consent to retirement and an immediate annuity negates the existence of any constitutionally cognizable property interest in Bloch, and so his due process claim must be rejected."[620] To justify his deferral to an agency's decision, Roberts utilizes the structural and doctrinal modalities to resolve both a statutory and a constitutional question, and again his use of the two modalities restricts him from imposing his own preconceptions and from advancing a realist or pragmatist position to resolve the case.

In fact, Roberts defers to Congress' intent and a statute's 'rule of recognition' when he determines that a lower court erred in its decision. In one case that reflects this approach, Roberts had the opportunity to address Senator Durbin's concerns about

[618] 348 F.3d 1060 (D.C. Circ., 2003).

[619] 348 F.3d 1060 (D.C. Circ., 2003): 9.

[620] 348 F.3d 1060 (D.C. Circ., 2003): 14.

sentencing guidelines. In *United States* v. *Tucker*[621] the appellate court reviewed a district court judge's decision to "depart downward" and reduce the sentence for a defendant because the judge did not agree with the Federal Sentencing Guidelines; as the judge said on record, he was "not going to be the instrument of injustice in this case."[622] Upon review, Roberts found that the judge's contravention of the Guideline's 'rule of recognition' prevented the judge from deviating from the legislatively-created, and thus valid, sentencing guideline. As Roberts explained, "[t]o the extent the district court based its departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines."[623] Roberts noted that some exceptions for downward departure in sentencing were "legally permissible – in rare circumstances," and a judge could consider "post-conviction rehabilitation" or "employment history or family responsibilities" as factors for a departure from the Guidelines. In the instant case, however, the district court judge failed to provide a written statement that explained his rationale for the departure, as required by the Guidelines, and as a result, Roberts wrote, "we are unable to discern whether and how the district court applied this body of law to the case at hand."[624] Roberts therefore concluded that "the district court was not attempting to apply the Guidelines in this case: it instead seemed intent on defying them – and 18 U.S.C. § 3553(c), to boot. . . . So long as these Guidelines are the

[621] 386 F.3d 273 (D.C. Circ., 2004).

[622] 386 F.3d 273 (D.C. Circ., 2004): 2.

[623] 386 F.3d 273 (D.C. Circ., 2004): 5.

[624] 386 F.3d 273 (D.C. Circ., 2004): 6.

law of the land, we – and the district courts – are obligated to apply them."[625] Roberts' holding in the case, which he advances with an institutional argument within the structural modality, demonstrates that he resolved the case from a positivist perspective: a 'rule of recognition' exists; it is a valid rule; exceptions to following the rule are valid rules; but, a judge-made change to the rule is not valid, and an activist decision by a judge violates the principle of judicial restraint. At the same time, the position Roberts advocates in his opinion is consistent with the position he advocates in his other writings: a respect for the separation of powers doctrine and a belief that legislatures, and not the judiciary, are charged with making and correcting the rules/laws.

Roberts' deference to agency decision-making also reveals his prudential approach for resolving statutory questions. For example, Roberts uses an institutional argument within the prudential modality to conclude his opinion in *Sioux Valley Rural Television, Inc.* v. *Federal Communication Commission*.[626] The *Sioux Valley* court held that the FCC appropriately handled licensing fees, and to reiterate that judges should exercise restraint, Roberts' cites an opinion from then-Judge Scalia of the D.C. Circuit Court: "The maxim that we must not substitute our judgment for that of the agency is 'especially true when the agency is called upon to weigh the costs and benefits of alternative policies.'"[627] While cost/benefit analysis influences Roberts' prudentialist decision-making, a hypothetical scenario about a need for a *potential* cost/benefit

[625] 386 F.3d 273 (D.C. Circ., 2004): 8.

[626] 349 F.3d 667 (D.C. Circ., 2003).

[627] 349 F.3d 667 (D.C. Circ., 2003): 20. Roberts cites Judge Scalia's opinion in *Center for Auto Safety* v. *Peck*, 751 F.2d 1336 (D.C. Circ., 1985): 1342.

analysis does not; instead, Roberts' prudentialism encourages him to 'limit the breadth of judicial authority.' As he explained in his opinion for the *In re Tennant* court,

> It is one thing to say that we have [writ if mandamus] authority. . . . It is quite another to claim such power solely on the basis that events *might* lead to a filing before an agency or lower court, which *might* lead to an appeal to this court . . . To dispense with even that preliminary requirement would effectively grant us jurisdiction to consider extraordinary writs in any case, because it is easy enough to spin out "for want of a nail" scenarios from any set of facts that could eventually lead to this court.[628]

Roberts, in essence, reverses the cost/benefit hypothetical to a scenario in which the costs of judicial activism outweigh the benefits of unrestrained appellate jurisdiction, a position reminiscent of the one he discussed in his Reagan-era memoranda on the efforts to curb an activist Supreme Court. Also reminiscent of his prior memoranda, Roberts refuses to open the floodgates into the judiciary and set a circuit court precedent that would increase the caseload of courts, a caseload that might include baseless claims. Roberts instead errs on the side of caution, and his exercise of judicial restraint in an area where he could make the law or shape the law reflects that he does not approach questions about the rules/laws from a realist or a pragmatist perspective.

Assessing Judge Roberts

A close reading of Roberts' appellate court opinions provides additional insight into the judicial philosophies to which he adheres to resolve competing claims on constitutional and statutory issues. Consistent with his letters and memoranda, Roberts uses of a variety of argument 'types' within several different modalities to advance his argumentative strategies, a practice that demonstrates that he adopts components of the

[628] *In re: James M. Tennant*, 359 F.3d 523 (D.C. Circ., 2004): 10. Italics in original.

positivist philosophy and incorporates them into the prudentialist philosophy. Roberts recognizes that the statutory text, and appellate court and Supreme Court precedent, limit his judicial authority; he defers to Congress' statutory intent and to other institutions' decision-making and statutory interpretation; he evaluates the costs and benefits associated with a decision; and, he attempts to balance individual rights against the rights of other institutions and society. Roberts, in other words, displays the hallmarks of the prudentialist judge who exercises 'modesty and humility' in decision-making.

Would Judge Roberts approach constitutional and statutory questions from a prudentialist perspective once he assumed a seat on the highest appellate court in the nation? The next chapter attempts to answer that question.

CHAPTER V

UMPIRING IN THE "BIG SHOW":

THE SUPREME COURT TESTIMONY AND OPINIONS

With the prospect of the potential seating of another conservative Justice on the bench, many Court watchers envisioned "a large-scale confirmation battle."[629] Even the media prepared for the impending showdown between the president and the Democrats on the Judiciary Committee. As one Conservative pundit remarked, "The media were expecting a contentious nomination, and they were going to cover one whether it materialized or not."[630] Unfortunately for the media, Roberts' hearings lacked the spectacle of the Thomas' hearings, and America avoided a take-no-prisoners war.

The judicial philosophy question, though, took center stage once again in the political drama surrounding Roberts' Supreme Court confirmation hearings. Roberts tried to defuse the issue, and he explained to Illinois Senator Richard Durbin that one could determine what type of Justice Roberts would be based on his "demonstrated commitment to the rule of law," and by examining his appellate court opinions and "what types of arguments I make and how I make those arguments and how faithful they are to the [Supreme Court's] precedents[.]"[631] The previous chapter examined Roberts'

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[629] Keith E. Whittington, "Presidents, Senates, and Failed Supreme Court Nominations," *The Supreme Court Review* 2006 (2006): 401.

[630] Gillespie, *Winning Right*, 198.

[631] U.S. Congress, Senate, Committee on the Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Congress, 1st session, September 12-15,

claim; this chapter leaves Roberts' paper trail and joins him at his final destination: the Supreme Court. For this chapter I read the complete text of his Supreme Court confirmation hearings, and I read the complete texts of his 56 published opinions from his first four Terms on the Supreme Court (the October 2005 Term through the October 2008 Term). Consistent with the previous chapter, the discussion in this chapter focuses on those aspects of his testimony and writing that correspond to the subjects and themes on which he wrote letters and memoranda from his time in the Reagan and Bush administrations, and it discusses cases similar to those for which he wrote an opinion as an appellate court judge. Such an approach serves two purposes: first, it allows the project to discern whether Roberts constructed argumentative strategies consistent with those he advanced in his prior writings and appellate court opinions, and second, it allows the project to evaluate whether Roberts resolved statutory and constitutional questions through one or more judicial philosophies consistent with those he utilized for resolving competing claims in his prior writings and appellate court opinions. The project's strategy, therefore, provides the necessary depth for investigating those two questions.

Greeting the Two Teams

Similar to the challenge he faced during his appellate court confirmation hearings, Roberts had to prove three important facts to the Judiciary Committee: first, that the positions he advocated for the Reagan and Bush administrations did not

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2005: 279. For a critique of Roberts' testimony, see Ronald Dworkin, "Judge Roberts on Trial," *New York Review of Books*, October 20, 2005, 14-17 (hereafter cited as *Roberts Hearings*).

represent his personal, ideological views; second, that his appellate court decisions were not ideologically-motivated; and, third, that he would not enter the Court with preconceptions about how to decide cases nor promote a Republican or Conservative/conservative agenda.

After the opening presentations from Indiana Senators Evan Bayh and Richard Lugar and Virginia Senator John Warren, Roberts delivered his opening statement. Roberts told the Committee that "a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. . . . Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench."[632] Roberts stuck largely to the confirmation game plan, as his opening remarks paralleled those he provided to the Committee in his pre-hearing 'Biography' questionnaire, in which he wrote that "a judge needs humility to appreciate that he is not necessarily the first person to confront an issue" and that "a judge must have humility to be fully open to the views of his fellow judges on the court."[633] Roberts' prudentialist description of a Justice provides the starting point for examining his testimony and his Court opinions to evaluate whether he approached constitutional and statutory questions from a prudentialist perspective or whether he used other philosophies to resolve those questions.

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[632] *Roberts Hearings*, 55.

[633] *Roberts Hearings*, 67.

The Famous/Infamous "Umpire Analogy"

In October 1984, then-Associate Justice William Rehnquist spent several days at the University of Minnesota Law School as a "Jurist in Residence." On October 19, he delivered a lecture, part of which included an analogy comparing the appointment process to a baseball game:

> Vacancies in the federal judiciary are filled by the President with the advice and consent of the United States Senate. Just as the courts may have their innings with the President, the President comes to have his innings with the courts.[634]

Rehnquist's statement went largely unheralded at the time, though legal scholars should have known from where Rehnquist drew his analogy: H.L.A. Hart, who compared judicial decision-making to a game with an official scorer.[635] In his book, Hart offered an analogy in which he likened the "scorer's discretion" to a judge's discretion. Hart discussed how the inconsistency of a scorer's rule-making affected predictability during the game, which he then compared to the problems with a judge who applies inconsistent rules and how that affects the predictability of the law.

Perhaps taking a cue from his mentor and predecessor, or perhaps stealing a base (page) from Hart's book, Roberts also offered a baseball analogy for the senators to consider. As most interested persons who followed Roberts' confirmation hearings know, Roberts offered the Judiciary Committee the now-famous (or -infamous) "umpire

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[634] Rehnquist, "Presidential Appointments to the Supreme Court," 319.

[635] Hart's analogy compares a "scorer's discretion" to a judge's discretion, and he discusses the ramifications of rule-making and predictability on the law associated with both. See Hart, *The Concept of Law*, 138-144. For a recent interpretation of Hart's game analogue, which also uses a baseball game and an umpire as its point of discussion, see Green, "Legal Realism as a Theory of Law," 1991-1993. Interestingly, Green's article appeared in print prior to the announcement of Roberts' nomination and his use of the analogy during his confirmation hearings.

analogy."[636] In his opening statement to the Committee, Roberts framed his description of a judge as a person who adheres to the 'rule of recognition.' As Roberts explained, "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. . . . I will remember that it's my job to call balls and strikes, and not to pitch and bat."[637]

Roberts' positivist response and his "umpire analogy," however, have their origin in a previous hearing: Roberts' appellate court hearing. During that hearing, Texas Senator John Cornyn asked, "Are you willing to commit to assuming a new role and a different role, and that is as an impartial umpire on the law, [and] legal arguments[?]"[638] Senator Cornyn revisited his analogy during Roberts' Supreme Court confirmation hearings, and Cornyn asked which type of umpire Roberts would be: The one who says, "Some are balls, and some are strikes, and I call them the way they are;" or, the one who says, "I call them the way I see them;" or, the one who says, "they ain't nothing till I call them." Roberts selected umpire two, and he explained that he was not umpire three since "they are balls and strikes regardless, and if I call them one and they are the other, that doesn't change what they are. It just means that I got it wrong."[639]

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[636] For commentary on Roberts' use of the umpire analogy, see Savage, "'Judges are Like Umpires,'" 36, and "Umpires," 5.

[637] *Roberts Hearings*, 55-56.

[638] *Confirmation Hearing on Federal Appointments,* 1.

[639] *Roberts Hearings*, 267.

Roberts' response, though, actually provides more insight into his view on the appropriate judicial philosophy a judge should use and which philosophies a judge should avoid. Roberts' choice of umpire two demonstrates that he believes the 'rule of recognition' creates the judicial strike zone, and his role as a Justice is to decide whether a constitutional or statutory claim falls within or outside that zone. By not selecting umpire one, Roberts rejects the rigidity of formalism and the judge who resolves cases in a mechanical way, and by not selecting umpire three, Roberts rejects the realist, pragmatist, and Dworkinist judge who practices activism to change, shape, or make the law as that judge sees fit. Roberts might get the pitch wrong, but a clear rulebook exists for determining whether that pitch crossed or missed the constitutional or statutory plate. Roberts' response to a post-hearing follow-up question from Senator Schumer best reflects these philosophical rejections:

> I believe that any interpretation, and especially that of broadly-worded provisions, requires judges to guard against the incorporation of their personal preferences into the law. . . . A judge who did not regard his role as that of an umpire, but instead as that of a player, would feel free to decide such questions on the basis of his own social policy preferences. I do not.[640]

As one could expect, critics questioned Roberts' use of the "umpire analogy." Martin Grabus, for example, argued that "[t]he Supreme Court, contrary to what Chief Justice Roberts says, is not a neutral umpire at all and never has been."[641] Jeffrey Toobin remarked that "Supreme Court justices are nothing at all like baseball umpires. It is folly to pretend that the awesome work of interpreting the Constitution . . . is akin to

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[640] *Roberts Hearings*, 640.

[641] Grabus, *The Next 25 Years*, 1.

performing the rote, almost mindless task of calling balls and strikes. When it comes to the core of the Court's work, determining the contemporary meaning of the Constitution, it is ideology, not craft or skill, that controls the outcome of cases."[642] Judge Posner offered a similar assessment, and he claimed that both Supreme Court Justices and judges on the federal appellate courts are "calling the balls and strikes" as well as "changing the rules," and the new rules are "political in character, especially in constitutional cases, because the changes are not dictated by the unambiguous language of authoritative documents, such as constitutional text."[643] Despite those concerns, columnist David Savage applied the analogy to the entirety of Roberts' testimony: "I would say one thing sort of in the baseball context: When this guy first takes the field, you would say: This guy was born to play the game. He is a real natural talent."[644]

Let the Pre-Game Warm-Up Begin

Roberts, of course, would have to defend his paper trail during his confirmation hearings. As he explained to Senator Schumer, "I think some 80,000 pages have been released of memoranda that I wrote[.]"[645] On the final day of testimony, Roberts offered Senator Schumer a similar remark: "The numbers [have] been ranging from 80,000 to 100,000, and there is a lot of paper out there." Roberts also added that after serving for

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[642] Toobin, *The Nine*, 338.

[643] Richard A. Posner, "Judicial Autonomy in a Political Environment," *Arizona State Law Journal* 38 (2006): 9.

[644] David G. Savage, "Evaluating the New Justices in Light of the Confirmation Ordeal," *Pepperdine Law Review* 34 (2007): 615.

[645] *Roberts Hearings*, 261.

two years on the appellate bench, he has "50 opinions. You can look at those. . . . I think if you look at what I've done since I took the judicial oath, that should convince you that I'm not an ideologue[.]"[646] Perhaps his most direct answer to the memoranda issue, and one tinged with his sharp wit, was his response to a question from Wisconsin Senator Herbert Kohl. In discussing the memoranda he drafted as a staff lawyer for the Reagan administration, Roberts explained, "I was promoting the views of the people for whom I worked. In some instances, those were consistent with personal views; in other instances, they may not be. In most instances, no one cared terribly much what my personal views were."[647] But the Committee cared now, and its members were determined to get Roberts to reveal his ideological leanings.

Questioning about the memoranda continued, and as he did during his appellate court confirmation hearings two years earlier, Roberts used the 'John Adams defense' to deflect responsibility for the memoranda he wrote for the Reagan administration. As Roberts explained to South Carolina Senator Lindsey Graham,

> You know, it's a tradition of the American Bar that goes back before the founding of the country that lawyers are not identified with the positions of their clients. The most famous example probably was John Adams, who represented the British soldiers charged in the Boston Massacre. He did that for a reason, because he wanted to show that the Revolution in which he was involved was not about overturning the rule of law, it was about vindicating the rule of law.[648]

Roberts offers a near word-for-word defense of the statement he made during his appellate hearing, but in this hearing he adds to the well-known 'good versus evil'

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[646] *Roberts Hearings*, 443.

[647] *Roberts Hearings*, 207.

[648] *Roberts Hearings*, 254.

dissociative dichotomy which he uses to cast new light on the idea that an attorney can represent a reprehensible client. Roberts uses the historical modality to argue that all people, no matter how reprehensible they may be, enjoy constitutional protections, which the founders of the Republic fought a war to establish; while some people may disagree with the defense of a person or a position, all people must recognize that the Constitution demands that those persons or positions be protected.

In addition to defending his memoranda, Roberts spent a major part of the three-day confirmation hearings defending his approach to constitutional interpretation. Roberts responded safely by repeatedly emphasizing his commitment to the principle of *stare decisis*. Roberts framed his approach early in the hearings in response to Pennsylvania Senator Arlen Specter's questions. As Roberts explained with an argument from authority, "Hamilton, in *Federalist No. 78*, said that, 'To avoid an arbitrary discretion in the judges, they need to be bound by rules and precedents.' So even that far back, the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, [and] the appearance of integrity in the judicial process."[649] As he did before, Roberts used the historical and doctrinal modalities to incorporate a component of originalism that complements his positivist perspective. Throughout his testimony, Roberts continually repeated those four purposes for following precedent, and he stressed that overruling precedent "is a jolt to the legal system."[650] Displaying his penchant for humor and reflecting his prudentialism, Roberts told Iowa Senator Charles

[649] *Roberts Hearings*, 142.

[650] *Roberts Hearings*, 144.

Grassley, "You begin with a basic recognition of the value of precedent. No judge gets up every morning with a clean slate and says, well, what should the Constitution look like today? The approach is a more modest one. You begin with the precedents."[651] Roberts' answer is similar to one he gave during an interview with *Scholastic News Online,* in which he explained his approach to deciding cases:

> I have a copy of the Constitution on my desk and the first thing I do when I have a case involving the Constitution is read what it says. I also have a copy of the *Federalist Papers*—a series of essays by the Founding Fathers that helps explain what the Constitution means. . . . I will go and find previous opinions of the Court that have interpreted the part of the Constitution at issue in a particular case, and I will read those opinions.[652]

Roberts' response reveals that he considers both original intent and original meaning prior to hearing oral arguments on the instant case, and that he turns to Supreme Court precedent to understand how prior Courts resolved similar cases. Roberts thus explains his preparation for hearing a case within the historical and doctrinal modalities, but he never indicates that he uses originalism as his interpretive approach; instead, he explains how precedent and the doctrine of *stare decisis* provide a background for his understanding of the constitutional and/or statutory questions in the instant case.

During his testimony, Roberts qualified the appropriate situations under which Justices may revisit precedent: first, if "precedents have proven to be unworkable," and second, "whether the doctrinal bases of a decision have been eroded by subsequent

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[651] *Roberts Hearings*, 180.

[652] "The Interview: Chief Justice John G. Roberts, Jr.," *Scholastic News Online,* September 14, 2006, http://content.scholastic.com/browse/article.jsp?id=7479 (accessed May 17, 2007).

developments."[653] Roberts argued that *Brown* v. *Board of Education*,[654] which overruled *Plessy* v. *Ferguson*,[655] and that *West Coast Hotel* v. *Parrish*,[656] which overruled the *Lochner* v. *New York*-era decisions,[657] justified revisiting precedent since the "intervening precedents had eroded the authority of those cases, [because] those precedents that were overruled had proved unworkable."[658] Roberts advances his argument within the doctrinal modality, and in so doing, he infers that the Court overruled precedent only after the appropriate authority—Congress—validly changed the 'rule of recognition;' the Court merely responded rather than changed the rules/laws.

Roberts also established parameters from within which Justices should decide cases. Similar to the position he defended during his appellate court testimony, Roberts rejects realism, pragmatism, and Dworkinism as acceptable interpretive approaches, and he instead defends the positivist and prudentialist approaches. As he explained to Utah Senator Orrin Hatch, the Court must recognize that "they're interpreting the law, they're not making policy, and to the extent they go beyond their confined limits and make policy or execute the law, they lose their legitimacy, and I think that calls into question the authority they will need when it's necessary to act in the face of unconstitutional

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[653] *Roberts Hearings*, 142.

[654] 347 U.S. 483 (1954).

[655] 163 U.S. 537 (1896).

[656] 300 U.S. 379 (1937).

[657] 198 U.S. 45 (1905).

[658] *Roberts Hearings*, 144.

action."[659] Roberts advocates for judicial restraint, and he argues that judge-made law does not produce valid law, and an activist judiciary actually undermines the credibility of a decision on a controversial case. Roberts takes a similar position on a related question in which he concedes that Hart's 'problems of the penumbra' exist, but that fails to give judges license to make the law, as the Justices did with the *Lochner* decision:

> [I]n most cases . . . most judges, [sic] know what it means to interpret the law, and can recognize when they're going too far into an area of making law, but certainly there are harder cases . . . go to a case like the *Lochner* case. You can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law. . . . It's right there in the opinion . . . they are substituting their judgment on a policy matter for what the legislature had said.[660]

Iowa Senator Charles Grassley reintroduced the topic during his questioning, and Roberts exhibited a more forceful tone and he once again drew the proverbial 'line in the sand.' As Roberts responded, "I have said that it is not the job of the Court to solve society's problems. . . . [Judges] don't have a license to go out and decide I think this is an injustice and so I'm going to do something to fix it. That type of judicial role I think is inconsistent with the role the Framer's intended."[661] Roberts' response parallels the rationale he provided in his *United States* v. *Tucker* appellate court opinion, the decision in which he held that a district court judge could not ignore the Federal Sentencing Guidelines simply because he thought they were unjust, and he uses an argument from authority within the historical modality to advance his positivist position. At the same

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[659] *Roberts Hearings*, 158.

[660] *Roberts Hearings*, 162.

[661] *Roberts Hearings*, 178.

time, Roberts chides judges who fail to exercise restraint and who resolve cases from a realist or a pragmatist perspective. In a later response, Roberts again incorporates the original intent component of originalism into his positivist perspective. As Roberts explained to South Carolina Senator Lindsey Graham, "[t]he Framers were not the sort of people, having fought a revolution to get the right of self-government, to sit down and say, let's take all the difficult issues before us and let's have the judges decide them. That would have been the farthest thing from their mind. The judges had the obligation to decide cases . . . according to the law, not according to their personal preferences."[662]

The most interesting aspect of Roberts' testimony regarding precedent did not take place during the oral questioning; instead, that aspect is found in his responses to the post-hearing questions the Committee members submitted to him. In response to one of Senator Biden's questions, Roberts wrote that "stare decisis . . . embodies essential rule of law values: reliance, fairness, predictability, and judicial integrity."[663] Roberts offered a similar response to a question from Senator Feinstein; for the first time, however, one discovers that Roberts based his explanation of precedent on dicta from the Court's plurality opinion in *Payne* v. *Tennessee*,[664] which he quoted in his response: "Stare decisis 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

[662] *Roberts Hearings*, 256.

[663] *Roberts Hearings*, 553. Underlining in original.

[664] 501 U.S. 808 (1991).

contributes to the actual and perceived integrity of the judicial process.'"[665] The author of the *Payne* opinion? Roberts' mentor and his predecessor, Chief Justice William Rehnquist. It appears that just as Judge Friendly's jurisprudence influenced Roberts' approach to the law and the judicial philosophy to which he adheres, Chief Justice Rehnquist's jurisprudence influenced Roberts' approach and philosophy as well.

Now Batting: Judicial Philosophy

Similar to one of the aspects of this project, other scholars have examined the texts of nominees' Court confirmation hearings and concluded that the Judiciary Committee often asks nominee about their prior court decisions.[666] Since Edwin Meese's calls for originalism and Judge Bork's testimony about his originalist approach to deciding cases, the quest to discern the judicial philosophy of nominees has taken on a greater importance for the Committee. As Roberts' hearings neared, one editorial encouraged the Committee "to examine Roberts' constitutional philosophy. He should be asked in detail his views of how the Constitution should be interpreted."[667] The members of the Committee heeded the call.

Roberts' responded to the Senators' questions about his philosophy in much the same manner that he responded to them during his appellate court hearings. When

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[665] *Roberts Hearings*, 563. Underlining in original. The *Payne* Court, however, overruled a three-year old precedent, and in his plurality opinion, Chief Justice Rehnquist follows his "*Stare decisis* is the preferred course . . . judicial process" statement by explaining that "when governing decisions are unworkable or badly reasoned" the Court can overrule precedent, and that "*Stare decisis* is not an inexorable command[.]"

[666] See Williams and Baum, "Questioning Judges about Their Decisions," 73-80.

[667] "Does Roberts Represent Mainstream Law, Values?" 11A.

pressed by Senator Hatch, Roberts simply replied, "I do not have an overarching judicial philosophy that I bring to every case."[668] With Senator Grassley, Roberts used an argument from dissociation to recast the issue: he framed the quest for the discovery of a philosophy into an 'academic theorizing' versus a 'judicial practicing' pairing in which the former should be considered less reliable than the latter. As Roberts explained to Senator Grassley,

> There are some areas where a very strict textualist approach makes the most sense. . . . In other areas, the Court's precedents dictate the approach. This is not something that is purely a matter of academic exercise. . . . So the approaches do vary, and I don't have an overarching view. As a matter of fact, I don't think very many judges do. I think a lot of academics do . . . the nuances of academic theory are dispensed with fairly quickly, and judges take a more practical and pragmatic approach to trying to reach the best decision consistent with the rule of law.[669]

Roberts did, however, differentiate his interpretive approach from that of a judge who follows a 'pure' originalist philosophy. As he explained to Senator Specter,

> I think the Framers, when they used broad language . . . they were crafting a document that they intended to apply in a meaningful way down the ages . . . they intended it to apply to changing conditions . . . when they adopt broad terms and broad principles, we should hold them to their word, and apply them consistent with those terms and those principles. . . . I depart from some views of original intent in the sense that those folks, some people view it as meaning just the conditions at that time, just the particular problem. I think you need to look at the words they used, and if the words adopt a broader principle, it applies more broadly.[670]

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[668] *Roberts Hearings*, 159.

[669] *Roberts Hearings*, 182.

[670] *Roberts Hearings*, 298-299.

Roberts offered a similar response to Senator Feinstein's post-hearing written question, in which she asked, "since different Framers and different legislators have different intent, whose intent is controlling?" Roberts responded:

> I do not mean to say that we should attempt to read the minds of drafters of the text, or that we should try to divine how they would have decided the case. Rather, I believe we should gauge their intent by the words that they have written, with the aid of accepted tools of interpretation. If the framers of some legal text decided to use broad language, we should hold them to their word and apply the provision as it is written.[671]

Roberts concluded his written response to Senator Feinstein by explaining that "the Court's precedents provide guidance on materials considered probative in ascertaining the intent of the Framers as a group."[672] Roberts' responses to the Senators' questions reflect that he recognizes that originalism encompasses both an original intent and an original meaning component, as he frames his responses within the historical and the textual modalities. Roberts trusts the authority of the Constitution's framers and ratifiers, but other interpretive materials also influence his decision-making.

The one area in which Roberts did outline his approach to resolving competing claims occurred during the questions that involved statutory interpretation. Senator Grassley, for example, wanted to know what importance Roberts gave legislative history when he interpreted statutes. Roberts explained that "when you are dealing with interpreting a statute, the most important part is the text. You begin with the text, and as the Supreme Court has said . . . that's also where you end." Roberts explained that as an appellate judge, he "relied on legislative history to help clarify ambiguity in the text,"

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[671] *Roberts Hearings*, 570.

[672] *Roberts Hearings*, 570.

and that he "quoted and looked to legislative history in the past to help determine the meaning of ambiguous terms, and I would expect to follow that same approach on the Supreme Court."[673] Roberts' responses to the Senators' questions should sound familiar: here, Roberts' quotes Justice Frankfurter from his *Whitehouse* Court opinion, and Roberts also included that same statement from Justice Frankfurter in the *PDK Laboratories* opinion Roberts wrote for the D.C. Circuit Court. Roberts extended his argument from authority to his post-hearing written responses as well, and he again quoted Justice Frankfurter to answer a question from Senator Biden: "As a general matter, statutory interpretation, [sic] 'begins with the statutory text, and ends there as well if the text is ambiguous.'"[674]

Arizona Senator Jon Kyl threw a statutory interpretation curveball to see how Roberts would call the pitch. He queried Roberts on how one Court could find a statute constitutional, yet another Court could find that same statute unconstitutional. Roberts took the opportunity to discuss the distinction between a facial challenge to a law and an as-applied challenge to a law. With a facial challenge, Roberts explained, "you're basically saying the law is unconstitutional without regard to the facts of the case . . . the law [is] so fundamentally flawed that it's unconstitutional however it's going to be applied." With an as-applied challenge, "a law . . . is not facially unconstitutional, but it may be applied in an unconstitutional manner." Roberts thus concluded that "a statute that is constitutional on its face can always be applied in an unconstitutional way,"

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[673] *Roberts Hearings*, 319.

[674] *Roberts Hearings*, 555. Quoting *BedRoc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004).

which means that one cannot conclude that a "statute could [not] ever be unconstitutionally applied."[675] Roberts' deceptively simple explanation deterred a more in-depth inquiry into the challenge distinctions, and Senator Kyl returned to asking Roberts about precedent.

Now Batting: The Standing Doctrine

The Committee's questions on statutory interpretation included inquiries on Roberts' *Duke Law Journal* article and his position on standing. Senator Leahy disapproved of Roberts' defense of Justice Scalia's opinion, and Leahy, without directly referencing the article, proceeded to ask a series of questions about whether individuals can sue if they feel a party is in violation of a law. Similar to the rationale he provided in his article and in his written response about *Lujan* v. *National Wildlife Federation*, Roberts explained how the legislative branch possessed the authority to resolve questions about standing. As Roberts told the senator, "Well, if Congress wants them to sue, all Congress has to do is write one sentence saying, 'Individuals harmed by a violation of this statute may bring a right of action in Federal court.' There are laws where Congress says that, and that question never comes up."[676] Roberts offered an argument from coherence within the structural modality to justify why the legislature, rather than the judiciary, has the responsibility for writing or clarifying the 'rule of recognition,' and in so doing, he again reaffirmed his positivist and prudentialist belief in

[675] *Roberts Hearings*, 198-199.

[676] *Roberts Hearings*, 416.

the need for judicial restraint, and he offered a resolution for those interested in knowing how the legislative branch, and not the judicial branch, can resolve standing problems.

Senator Leahy also specifically asked Roberts about the *Duke Law Journal* article. Leahy wondered whether "individuals under Chief Justice Roberts" who sought relief from the Court would "find the courthouse door slammed shut in their face[.]" Roberts advised that those individuals should "read the rest" of his article, which addressed the issue of "whether anyone could bring a lawsuit just because they are interested in the issue, or whether the plaintiffs had to show that they had been injured." The central issue, Roberts explained, was "whether somebody halfway across the country who's not injured by that act should be able to bring suit."[677] Ohio Senator Mike DeWine also asked Roberts about the article, which Roberts humorously referred to as "that small little Law Review [sic] comment," the point of which was "that judges should be very careful to make sure they've got a real case or controversy before them, because that is the sole basis for the legitimacy of them acting in the manner they do in a democratic republic."[678] Roberts stressed that "[w]hat the standing doctrine requires is that you actually be injured by what the Government is doing, injured by Congress's action." Roberts explained that "the injury doesn't have to be economic;" the injury "can be aesthetic, it can be environmental, it can cover a wide range of injuries, but you have to show some injury that separates you from the general public."[679] Roberts thus

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[677] *Roberts Hearings*, 156.

[678] *Roberts Hearings*, 342.

[679] *Roberts Hearings*, 342-343.

provided a definitional argument to change the perception of what it means to have grounds for a lawsuit: the Court is not an open forum where the Justices should hear cases simply because individuals have a concern about a constitutional or statutory question; instead, the Court is the place where those individuals harmed by a direct action of the defendant deserve their day in Court. Roberts, in fact, opened the Courthouse door and welcomed plaintiffs who suffered almost any injury—as long as they experienced a direct harm that resulted from the defendant's actions.

Now Batting: International Law

An interesting aspect of the hearings involved the Committee's concern with how Roberts' would incorporate foreign laws and precedents into his decision-making. Senator Kyl, for instance, asked Roberts about "the proper role of foreign law in U.S. Supreme Court decisions" in cases that "involve interpretations of the U.S. Constitution[.]" Roberts replied that there were "a couple of things that cause concern on my part about the use of foreign law as precedent," and he provided two explanations for his concerns. "The first has to do with democratic theory," he said. In the United States, the president nominates judges, the Senate confirms the judges, and both the president and the senators are elected representatives of the people; thus, the president and senators are accountable to the people, and judges, therefore, are indirectly accountable. Another country's judge's interpretation about America's Constitution should not shape domestic law since that judge is not accountable to the American people.[680] Roberts provided a similar response to a written question from Senator Kennedy: "If a court

[680] *Roberts Hearings*, 201.

relies on a decision of a foreign judge, however, no President accountable to the people appointed that judge, no Senate accountable to the people confirmed that judge, and yet that judge is playing a role in shaping the law that binds people in this country."[681] Roberts' second concern "is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does." Judges could pick and choose any precedent from any country and apply it to the American case at hand, which "expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences," Roberts explained.[682] Roberts uses the historical, structural, and doctrinal modalities to justify his position, and his hesitation to rely on foreign law and precedent reflects his positivist beliefs: legislatures establish valid 'rules of recognition' that both constrain a judge's decision-making and provide a guide for judges to follow, and judges who introduce new rules/laws into the game to fit the instant case exceed their authority and circumvent the will of the people as well as the Congress.

Oklahoma Senator Tom Coburn approached the issue with a different tack, and he wanted Roberts to commit "to not use foreign precedent" if seated on the Court. Roberts would not commit to such a position, but he did explain that prior Supreme Court decisions may have considered, but did not rest, "entirely on foreign law, so it's not a question of whether or not you'd be departing from these cases if you decided not

[681] *Roberts Hearings*, 584.

[682] *Roberts Hearings*, 201.

to use foreign law."[683] Roberts successfully called the pitches as he saw them, and the topic received little attention from the other Committee members.

Now Batting: Civil Rights, Take III

The confirmation hearings would not be complete without some questions about Roberts' position on defending civil rights and supporting efforts to curb discrimination. Roberts again defended the position that only the legislature possessed the authority to alter the 'rules of recognition,' and judges are obligated to follow Congress' intent. As he explained to Senator Feingold: "If you folks here in Congress had a particular—in any statute, a narrow focus, then to give that focus a broader impact I think would be wrong. If you had a broad focus, as, of course, you often do when you're dealing with statutes designed to address discrimination, giving that interpretation a narrow focus would be wrong."[684] Roberts' institutional argument within the structural modality further clarified his positivist and prudentialist approach, an approach he defended consistently throughout the hearings.

Senator Kennedy, the most ardent skeptic of seating Roberts on the bench, questioned Roberts about the landmark holding in *Brown* v. *Board of Education*. Kennedy pressed Roberts on whether he "accept[ed] both the holding and the reasoning in the case[.]" Displaying his sharp intellect, Roberts offered a striking response, and he praised the reasoning of the Justices: "[T]he genius of the decision was the recognition that the act of separating the students was where the violation was and it rejected the

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[683] *Roberts Hearings*, 293.

[684] *Roberts Hearings*, 437.

defense, certainly just a theoretical one given the record, that you could have equal facilities and equal treatment."[685] Roberts' prudentialist interpretation of the decision clearly surprised the Senator; rather than saying anything in response to Roberts' answer, Senator Kennedy simply said, "If we could move on now. . . ."[686]

On the final day of his testimony, Senator Schumer returned to the *Brown* decision. Roberts again used the prudentialist modality to characterize the decision as both a positivist and a prudentialist decision, and he explained to Senator Schumer that the *Brown* decision should be "more appropriately understood as a restrained decision compared to the decision that came before in *Plessy* v. *Ferguson*. And you can see this if you look at the arguments of the lawyers." Roberts explained that rather than the Court issuing an activist decision, the Court actually decided the case based on precedent. John W. Davis, the advocate for the Board, warned of "the social consequences of upsetting this decision," by which Roberts meant the impact of changing the settled expectations of prior precedent. On the other side, Thurgood Marshall, Brown's advocate, "was making a legal argument addressed to the obligation of the Court to apply the rule of law . . . focused on the discrimination involved in the segregation . . . it was a very clever approach to the case because he based his decision on precedent as well."[687] At the conclusion of the *Brown* discussion, Roberts sounded neither like a

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[685] *Roberts Hearings*, 168.

[686] *Roberts Hearings*, 168.

[687] *Roberts Hearings*, 409.

Conservative/conservative ideologue nor as a potential Justice hell-bent on opposing individual rights and the efforts to reverse discrimination.

Roberts also addressed the busing topic that still lingered from his Reagan-era service. Roberts explained to Senator Schumer that "[b]eing against busing and being against quotas is not the same thing as being against civil rights,"[688] and he told Senator Kennedy that "[o]pposition to quotas is not the same thing as opposition to affirmative action."[689] While he did not elaborate on either claim, Roberts offered answers consistent with those he provided elsewhere in his testimony: judges lack the authority to change or make the law on those issues; that responsibility lies with the Congress. Roberts demonstrated his positivist perspective later in the hearings when he told Senator Durbin, "I don't think you want judges who will decide cases before them under the law on what they think is good, simply good policy for America. There are legal questions there."[690] Roberts took a stand against realism and pragmatism, and none of the Senators charged the plate to kick sand on Roberts' shoes; instead, Roberts again appeared to be the umpire who would call a fair game.

Now Batting: The Eighth Amendment

Surprisingly, the Committee devoted very little time to questioning Roberts about his views on what constitutes "cruel and unusual punishment." Kansas Senator Sam Brownback did, however, submit post-hearing questions for Roberts to answer on that

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[688] *Roberts Hearings*, 261.

[689] *Roberts Hearings*, 422.

[690] *Roberts Hearings*, 392.

issue. Referencing Supreme Court precedent, Roberts outlined a three-tiered test for evaluating an Eighth Amendment claim. First, he cited the Court's 1958 decision *Trop* v. *Dulles*,[691] which he referenced to explain "that what is cruel and unusual must be evaluated in light of 'the evolving standards of decency that mark the progress of a maturing society.'" For the second tier of the test, the Court must consider "the contemporary understanding of what constitutes cruel and unusual punishment," a standard which is discussed in the Court's 1977 *Coker* v. *Georgia*[692] decision. As the third prong of the test, Roberts explained that since some states oppose, while other states impose, the death penalty, "[t]he actions of state legislatures represent the 'clearest and most reliable objective evidence of contemporary values,'" a position discussed in the Court's 1989 *Penry* v. *Lynaugh*[693] decision.

Roberts' three-tiered test, which he grounds in the doctrinal modality, removes the issue from the subjective, personal-preference to a (theoretically) more objective, legally-based belief. In other words, Roberts would base his decision on the existing 'rule of recognition' rather than imposing his own beliefs or crafting the law based on his own views of what type of punishment best serves society and the changing political and social climate regarding "cruel and unusual" punishments. Even on a difficult constitutional issue, Roberts interprets the competing claims through the positivist and prudentialist perspectives.

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[691] 356 U.S. 86, 100-101 (1958).

[692] 433 U.S. 584, 592 (1977).

[693] 492 U.S. 302 (1989).

Now Batting: The Right to Privacy

Roberts' views on the right to privacy also received little attention during his hearings. During Senator Specter's questioning, Roberts used the historical modality to outline his interpretation of the right to privacy. As Roberts explained,

> The right to privacy is protected under the Constitution . . . by the Fourth Amendment, which provides that the right of people to be secure in their persons, houses, effects, and papers is protected . . . under the First Amendment, dealing with prohibition on establishment of a religion and guarantee of free exercise, protects privacy in matters of conscience . . . the Court has . . . recognized that personal privacy is a component of the liberty protected by the Due Process Clause.[694]

Determining what qualifies as a violation, however, is a completely different issue. For Roberts, the Constitution protects the right to privacy and prohibits 'unreasonable searches and seizures;' however, the Constitution does not resolve the instant case. Roberts used the historical and textual modalities to explain the role that original intent and original meaning play in resolving privacy claims that arise under the Fourth Amendment. "If the phrase in the Constitution says two-thirds of the Senate, everybody's a literalist," Roberts told Senator Hatch. With broad, imprecise phrases such as "unreasonable searches and seizures," original meaning cannot resolve the issue. "You can look at that wording all day and it's not going to give you much progress in deciding whether a particular search is reasonable or not." The progress, Roberts said, comes from "looking at the cases and the precedents, what the Framers had in mind when they drafted that provision."[695] Roberts further develops his interpretation in a

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[694] *Roberts Hearings*, 146-147.

[695] *Roberts Hearings*, 159.

response to a written question from Senator Feinstein: "In concrete cases, however, a judge cannot answer in the abstract whether a person has a reasonable expectation of privacy in any given situation. Instead, [sic] whether a person's expectation of privacy is 'reasonable' turns on the facts of the particular case."[696] Roberts' answers on the privacy question reveal that, for him, an originalist philosophy will not resolve the competing claims, but more important, he alludes that evaluating the claim might require a prudentialist approach.

End of the Warm-Up

At the conclusion of Roberts' confirmation hearings, most Court followers concluded that the hearings were "tamer than many expected or hoped."[697] Perhaps the hearings, which one reporter described as "a model of dignity and erudition,"[698] reflected a more meaningful 'advice and consent' process, an investigation that eschewed the rancorousness that characterized the Bork and Thomas hearings.

Court followers did agree that Roberts deserved high marks for his accomplishments before the Committee. In assessing Roberts' performance, one legal scholar commented that Roberts' "razor-edged legal intellect, fair-minded civility, past Democratic endorsements, and a complete absence of culturally polarizing law-journal [sic] articles carrying his byline" resulted in the Judiciary Committee's "liberals lobbing

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[696] *Roberts Hearings*, 573.

[697] Whittington, "Presidents, Senates, and Failed Supreme Court Nominations," 402.

[698] Savage, "'Judges are Like Umpires,'" 36.

softballs at a nominee they'd been hoping to nuke."[699] Henry Abraham, a leading Court scholar, remarked, "Roberts proved to be a master respondent, emphasizing his dedication to judicial restraint, to a deference to precedent, to a limited role—he called it a 'role of modesty and stability'—for the judiciary."[700] Several reporters noted that Roberts showed "flair" during "his confirmation hearings,"[701] while others reported that Roberts "impressed members of both parties with his intellect and his legal acumen."[702] Former Associate Justice Sandra Day O'Connor remarked that Roberts "did a masterful job navigating the always perilous waters of the confirmation process."[703] Perhaps the highest praise came from one of the men charged with helping the president secure Roberts' nomination for the Court: "Roberts validated the president's faith in him, shining in the hearings and proving without a doubt that he was fully suited to fill the robes of the mentor he had clerked for decades earlier. . . . His performance was a tour de force, beginning with his opening statement. . . . As he deftly answered and deflected questions over the course of the next three days, his confirmation became a forgone conclusion."[704]

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[699] Vincent, "Roberts Rules," 13.

[700] Abraham, *Justices, Presidents, and Senators*, 5th ed., 318.

[701] Jeanne Cummings and Jess Bravin, "High-Court Nominee Plays Down Some of His Reagan-Era Writing," *Wall Street Journal*, January 11, 2006, A4.

[702] Sheryl Gay Stolberg and Elisabeth Bumiller, "Democrats Spilt—Focus Now on 2nd Pick," *New York Times*, September 30, 2005, A20. Another legal scholar remarked, Roberts' "vast knowledge of constitutional law and easygoing demeanor impressed and charmed the Judiciary Committee." Porto, *May It Please the Court*, 2nd ed., 130.

[703] O'Connor, "John Roberts."

[704] Gillespie, *Winning Right*, 202-203.

Ultimately, the Judiciary Committee voted 13 to 5 in favor of Roberts' nomination[705] and it sent his name to the floor, where the full Senate voted along partisan lines and confirmed Roberts by a 78 to 22 vote. On September 29, 2005, Associate Justice John Paul Stevens swore in John G. Roberts, Jr., as the 17th Chief Justice of the United States Supreme Court.[706] Judge John Roberts would now be calling balls and strikes as the umpire no one came to the game to see.

Calling the Games in the Major League

A review of Roberts' testimony from his confirmation hearings demonstrates that Roberts consistently advocated the positivist and the prudentialist perspectives for resolving competing claims on statutory and constitutional questions. Similar to his prior writings, Roberts used a variety of argument 'types' and modalities to construct his argumentative strategies. To discern whether Roberts maintained those consistencies once seated on the Court, this project involved a close-reading of the complete texts of the 56 published opinions he authored from the 2005 Term through the 2008 Term. The chapter, therefore, examines a representative sampling of opinions to discern whether Chief Justice Roberts constructed argumentative strategies consistent with those he advanced in his prior writings and his confirmation hearing testimony, and whether his legal reasoning and rationale for his resolution of the cases provides the answer to the question that Court followers wanted to know: to what judicial philosophy will Chief

[705] Neubauer and Meinhold, *Battle Supreme*, 53.

[706] The Senate voted largely along party lines: all 55 Republicans voted "aye," as did 22 Democrats and the lone Independent, Vermont's Jim Jeffords. See "The Democratic Divide," A10. Also see Cummings and Bravin, "With Roberts In, Bush Looks Ahead," A3.

Justice John Roberts subscribe to resolve the statutory and constitutional questions in the cases he hears?

Umpiring His First Game

With his first opportunity to author an opinion as a member of the Supreme Court, Roberts wrote the opinion in *Martin* v. *Franklin Capital Corporation*.[707] Those expecting a Cardozo- or Holmes-like opinion from the Chief Justice instead read a rather bland opinion; in fact, those opposed to the Justices' penchant for crafting opinions characterized by rhetorical flourishes should laud Roberts for his restraint. Calling his first game for the Court, Roberts used the opportunity to pay homage to his mentors and to signal just how narrow his strike zone would be.

The question the *Martin* Court had to resolve was whether the Tenth Circuit Court of Appeals rightfully concluded that the district court had not abused its judicial discretion in denying the Martins their attorney fees. Franklin Capital Corporation and Century-National Insurance Company (collectively, Franklin) removed the case from New Mexico state court to federal district court, but the federal district court remanded the case back to the state court. As a result of the remand, the Martins argued that they were entitled attorney's fees under 28 U.S.C. §1447(c).

Roberts turned to the statutory text to address the Martins' claim "that attorney's fees should be awarded automatically on remand, or that there should at least be a strong presumption in favor of awarding fees." Roberts provided a definitional and an

[707] 546 U.S. 132 (2005). To access Roberts' opinions, I used the Cornell University Law School/LII Legal Information Institute website (http://www.law.cornell.edu/supct/index.html). The page numbers cited for Roberts' opinions correspond to the page numbers on the opinions retrieved from the website.

institutional argument to answer the claims: "Section 1447(c), however, provides that a remand order 'may' require payment of attorney's fees—not 'shall' or 'should.'"[708] To support his rationale for his interpretation of the statutory text, Roberts cites *Fogerty* v. *Fantasy, Inc.*, an opinion written by his mentor, Chief Justice Rehnquist, who argued that "[t]he word 'may' clearly connotes discretion. The automatic awarding of attorney's fees to the prevailing party would pretermit the exercise of that discretion."[709] Roberts also used a structural argument to support his and Rehnquist's conclusion: "Congress used the word 'shall' often enough in §1447(c) . . . to dissuade us from the conclusion that it meant 'shall' when it used 'may' in authorizing an award of fees."[710] Reiterating this balance later in his opinion, Roberts defers to Congress' intent rather than exercising his own or the Court's discretion: "Congress could have determined that the most efficient way to cure this jurisdictional defect was to create a substantive basis for ordering costs. The text supports this view. . . . We therefore give the statute its natural reading: Section 1447(c) authorizes courts to award costs and fees, but only when such an award is just."[711] Roberts' use of the structural modality to justify his deference to Congress' intent parallels the argumentative strategy he used in his appellate court opinions to resolve statutory claims.

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[708] 546 U.S. 132 (2005): 3-4.

[709] 510 U.S. 517 (1994): 533.

[710] 546 U.S. 132 (2005): 4.

[711] 546 U.S. 132 (2005): 5-6.

Roberts also signals through dicta just how narrow his strike zone will be. Roberts, in a demonstration of his belief in judicial restraint, explains that "incorrectly invoking a federal right is not comparable to violating substantive federal law,"[712] and the Justices' will not alter the 'rule of recognition' simply because the plaintiffs failed to raise the correct claim. To support this belief, and reminiscent of the explanations he offered throughout his appellate court opinions, Roberts references his other mentor, Judge Friendly, and Roberts states that "[d]iscretion is not a whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."[713] Roberts also advises that "[t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources."[714] Roberts' statements of dicta are not binding law that other Courts/courts must follow; instead, the dicta reveal those components of positivism and prudentialism that Roberts believes judges and Justices should follow when resolving competing claims on constitutional and statutory questions: adhere to the 'rule of recognition;' promote the stability and predictability of the law; defer to other institutions' interpretation of valid rules/laws; and, exercise judicial restraint and avoid 'bold forays into policy-making.'

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[712] 546 U.S. 132 (2005): 5.

[713] 546 U.S. 132 (2005): 4. Roberts paraphrases a section from Friendly's law journal article. See Henry J. Friendly, "Indiscretion about Discretion," *Emory Law Journal* 31 (1982): 758. Roberts makes this same statement in his concurring opinion in for the *eBay* Court. See *eBay Inc.* v. *MercExchange*, 547 U.S. 388 (2006): 2.

[714] 546 U.S. 132 (2005): 8.

Roberts' first opinion, therefore, provides a preview of how the new Chief Justice might approach the cases that come before the Court. As all academics know, however, conclusions cannot be drawn from a single case. Fortunately, Roberts authored other opinions that provide insight into whether the strike zone he established in his first opinion would be the strike zone he maintained for other batters who sought their day in Court.

An Umpire's Wit and Wisdom

As in his letters, memoranda, and appellate court opinions, Roberts displays a sharp wit in his Court opinions. At times, he includes a short remark to emphasize a key point in a case. In his dissenting opinion in *House* v. *Warden*,[715] for example, Roberts notes that the petitioner's alibi collapsed under the facts: "Sometimes, when identity is in question, alibi is key. Here, House came up with one—and it fell apart, later admitted to be fabricated when his girlfriend would not lie to protect him. Scratches from a cat indeed."[716] At other times, Roberts uses his wit to summarize the key facts of the instant case. He begins his opinion in *Dean* v. *United States*[717] with a straightforward fact: "Accidents happen. Sometimes they happen to individuals committing crimes with loaded guns."[718] Roberts uses this opening as the grounds for his warning to would-be criminals:

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[715] 547 U.S. 578 (2006).

[716] 547 U.S. 578 (2006): 17.

[717] 129 S. Ct. 1400 (2009).

[718] 129 S. Ct. 1400 (2009): 1.

> An individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally. A gunshot in such circumstances—whether accidental or intentional—increases the risks that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response. Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying violent or drug trafficking crime, leave the gun at home, or—best yet—avoid committing the felony in the first place.[719]

While an example of humorous dictum, Roberts actually reframes the facts from the case, he fits them into his narrative, and he reveals another aspect of the prudentialist perspective he brings to instant case: the costs, whether accidental or intentional, of a crime do not outweigh the benefits to committing the crime. Prudentialism dictates that the tie goes to societal rights rather than to the rights of the individual who broke the statutory law.

Now Batting: Statutory Intent

Many of Roberts' Court opinions reflect his consistent use of the positivist and prudentialist philosophies to resolve cases that involve questions about statutory intent. As he did in his appellate court opinions to resolve competing claims about the meaning of a statute, Roberts often defers to the actual text of the statute to determine Congress' intent. In some cases, he offers a simple statement that signals how the resolution of the case will proceed, as he did in *Vaden* v. *Discover Bank*: "The statute provides a clear and sensible answer."[720] In other cases, such as *Knight* v. *Commissioner of Internal Revenue*,[721] he begins his rationale for his resolution by citing Court precedent, a

[719] 129 S. Ct. 1400 (2009): 8.

[720] 129 S. Ct. 1262 (2009): 1.

[721] 552 U.S. 181 (2008).

practice he used in his appellate court opinions. Quoting *Williams* v. *Taylor,*[722] Roberts writes, "We start, as always, with the language of the statute."[723] In cases similar to those noted above, Roberts approaches the cases by comparing the facts of the case to the text of the statute, and he uses the established 'rule of recognition' to guide his decision-making.

There are cases, though, in which Roberts provides a more thorough assessment for why the statutory text and/or Congress' intent offer a simple resolution to the case. *United States* v. *Clintwood Elkhorn Mining Company,*[724] for example, addressed whether a taxpayer could claim a refund when that request was made after the filing deadline established by the Internal Revenue Code. In his opinion, Roberts offered an institutional argument within the structural modality to address the issue. As Roberts wrote, "The outcome here is clear given the language of the pertinent statutory provisions. . . . Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach. . . . We cannot imagine what language could more clearly state that taxpayers seeking refunds . . . [must] file a timely administrative claim."[725] In *CSX Transportation, Inc.* v. *Georgia State Board of Equalization,*[726] a case that involved a

[722] 552 U.S. 181 (2008): 5.

[723] 529 U.S. 240 (2000): 431.

[724] 553 U.S. 1 (2008).

[725] 553 U.S. 1 (2008): 4-5.

[726] 552 U.S. 9 (2007).

state's valuation and taxation scheme for railroad property, Roberts offered an equally succinct interpretation of the statutory question. As Roberts explained,

> If Congress had wanted to impose such a limit by reserving to States the prerogative of selecting which valuation methods may be used, it surely would have done so. . . . Congress could easily have included similar language insulating the State's chosen methodology from judicial scrutiny. It did not. . . . We decline to find distinctions in the statute where they do not exist, especially where, as here, those distinctions would thwart the law's operation.[727]

Roberts' institutional argument within the structural modality once again reaffirms his commitment to judicial restraint, and to discern Congress' intent he relies on the 'rule of recognition' established by the text of the statute, which he argues promotes the stability and predictability of the law.

In addition to deferring to Congress' intent with respect to a statute, Roberts also uses his positivist and prudentialist philosophies to justify his deference to the judgment of a district court, as long as the court's interpretation of the statute falls within the parameters of the *Chevron* doctrine. In *House* v. *Warden*,[728] the petitioner claimed that the district court erred when it refused to admit newly presented evidence that might have persuaded a future jury to acquit the petitioner. In his dissenting opinion, Roberts offers an institutional argument within the doctrinal and structural modalities to remind the majority that their role as Justices is to exercise restraint rather than ignore the 'rule of recognition' and read the law to fit the aims they believe the law should serve. As Roberts writes,

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[727] 552 U.S. 9 (2007): 9.

[728] 547 U.S. 578 (2006).

> The majority essentially disregards the District Court's role in assessing the reliability of House's new evidence. . . . By casting aside the District Court's factual determinations . . . the majority has done little more than reiterate the factual disputes presented below. . . . *Schlup*[729] made abundantly clear that reliability determinations were essential, but were for the district court to make. . . . We are to defer to the better situated District Court on reliability, unless we determine that its findings are clearly erroneous.[730]

Roberts reminds the *House* Court that "[t]he District Court attentively presided over a complex evidentiary hearing," and consequently, the Supreme Court is "poorly equipped to second-guess the District Court's reliability findings and [we] should defer to them, consistent with the guidance we provided in *Schlup*."[731] At the same time, Roberts' rejects the pragmatist/realist approach the Court used to deny deference to the district court's findings.

Roberts does recognize, however, that 'problems of the penumbra' exist and that the statutory text may not provide easy answers to the claims before the Court. Consistent with the position he advocated in his memoranda and appellate court opinions, though, he argues that the Court lacks the authority to alter the 'rule of recognition' to correct the deficiencies with the rule/law; in fact, those deficiencies demand greater restraint from the Justices. *United States* v. *Hayes*,[732] for example, concerned the phrase "misdemeanor crime of domestic violence" and its correct grammatical interpretation. Roberts wrote his dissenting opinion as if he was teaching a

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[729] *Schlup* v. *Delo*, 513 U.S. 298 (1995).

[730] 547 U.S. 578 (2006): 6-7.

[731] 547 U.S. 578 (2006): 11.

[732] 129 S. Ct. 1079 (2009).

"Composition 101" course, and he provided a five-page definitional argument in which he discussed the correct way the majority should have read the phrase. The point of Roberts' lesson was that the statute's definitional confusion exemplifies why the Court should exercise restraint. As Roberts wrote to conclude his opinion,

> Taking a fair view, the text of §921(a)(33)(A) is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much. This is a textbook case for the application of the rule of lenity. . . .
>
> If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority.[733]

Unlike in his opinion for the *Dean* Court, in which Roberts concluded that "the rule of lenity" did not apply because there was not "grievous ambiguity or uncertainty in the statute,"[734] the ambiguity and uncertainty of the statutory text in the instant case justifies lenity. Roberts' *Hayes* opinion thus reflects his positivist commitment to the consistent application of an accepted 'rule of recognition,' as well as demonstrates that Roberts believes that questionable statutory interpretations do not create opportunities for the Justices to adopt a realist or pragmatist approach and correct the statute. At the same time, Roberts incorporates those positivist components into his prudentialist philosophy, as he determines that the costs of the Court's new rule outweigh the benefits for those to whom the (invalid) judicially-created rule applies.

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[733] 129 S. Ct. 1079 (2009): 8.

[734] See 129 S. Ct. 1400: 9.

When 'problems of the penumbra' arise, Roberts applies his positivist and prudentialist expectations for judicial restraint to the Supreme Court as well as to the lower courts. In his concurring opinion in *LaRue* v. *DeWolff, Boberg & Associates, Inc.,*[735] Roberts notes that plaintiffs encounter difficulty when determining whether they have "a claim for benefits" or "a claim of breach of fiduciary duty" as those are not "settled questions," but the Court is not "in a position to answer them."[736] Writing for the *Knight* Court, Roberts acknowledges in that economic case that the statute in question fails to provide the Court with any "regulatory guidance . . . but that is no excuse for judicial amendment of the statute."[737] Roberts offers a similar statement in a case involving the efforts of lower courts to reduce the number of prisoner complaints by enacting stronger pleading requirement rules. In his opinion for the Court in *Jones* v. *Bock,*[738] Roberts explained that the Court is "not insensitive to the challenges faced by the lower federal courts in managing their dockets . . . We once again reiterate, however, . . . that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, not on a case-by-case basis by the courts."[739] Roberts' opinions in all three cases reflect that he interprets the statutory questions from both a positivist and a prudentialist perspective,

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[735] 552 U.S. 248 (2008).

[736] 552 U.S. 248 (2008): 4.

[737] 552 U.S. 181 (2008): 12.

[738] 549 U.S. 199 (2007). Decided with *Williams* v. *Overton*, 05-7142.

[739] 549 U.S. 199 (2007): 24.

and that Justices or judges who adopt a realist or a pragmatist perspective exceed their authority when they legislate from the bench.

Roberts' appellate court experience in resolving claims under the Administrative Procedure Act of 1988[740] and the *Chevron* doctrine also guides his resolution of cases that raise statutory claims in which an agency exceeded its authority. In his concurring opinion in *Rapanos* v. *United States*,[741] Roberts uses the positivist approach to address the issue in the instant case. As Roberts explains,

> Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. . . . Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the [Army] Corps [of Engineers] and the EPA [Environmental Protection Agency] would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.
>
> The proposed rulemaking went nowhere. . . . [T]he Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.[742]

Roberts relies on both the statutory text and Congress' intent to explain his rationale for how the agencies' exceeded their authority and violated the 'rule of recognition,' and his use of an argument from coherence within the structural modality reflects not that he opposes environmental protections, but that he instead opposes actions that undermine the stability and predictability of the law upon which others rely for guidance.

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[740] 5 USC 706(2)(A).

[741] 547 U.S. 715 (2006).

[742] 547 U.S. 715 (2006): 2.

Now Batting: The Standing Doctrine

While skeptics of Roberts' confirmation to the Supreme Court identified his *Duke Law Journal* article as proof that Roberts opposed environmental protections, most skeptics' arguments overlooked the key point that Roberts' advocated: for a Court/court to hear a case, the plaintiff must prove that an action of the defendant resulted in a direct harm to the plaintiff; in the absence of such proof, the Court/court lacks standing to hear the case. Once seated on the Supreme Court, Roberts had two opportunities to prove that he followed his interpretation of the doctrine of standing when resolving cases rather than simply when writing about them.

During the 2005 Term, Roberts wrote the Court's opinion for a case that involved a question of a groups' standing. To encourage the manufacturer of the Jeep line of vehicles to expand its manufacturing facilities in Ohio, both the city of Toledo and the state offered tax breaks to DaimlerChrysler if the company agreed to expand there. A group of Toledo citizens filed suit, in which they argued that their state tax burdens increased as a result of the tax breaks given to DaimlerChrysler, and the citizens claimed that under Ohio law, the tax credit violated the Commerce Clause.

In his *DaimlerChrysler* v. *Cuno* opinion,[743] Roberts' held that the Supreme Court is "obligated before reaching this Commerce Clause question to determine whether the taxpayers who objected to the credit have standing to press their complaint in federal court. We conclude that they do not, and we can therefore proceed no further."[744]

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[743] 547 U.S. 332 (2006).

[744] 547 U.S. 332 (2006): 2.

Roberts offered a three-part rationale for denying the taxpayers' standing under Article III.

Roberts applies the separation of powers doctrine as the first reason for why the taxpayers lack standing. Roberts offers two arguments from authority and an argument from coherence within the historical and structural modalities to explain why the case falls outside the Court's appellate jurisdiction. As Roberts explains,

> Chief Justice Marshall, in *Marbury* v. *Madison,*[745] . . . grounded the Federal Judiciary's authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases. . . . If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.
>
> This Court has recognized that the case-or-controversy limitation is crucial in maintaining the "tripartite allocation of power" set forth in the Constitution[746] . . . . We have been asked to decide an important question of constitutional law concerning the Commerce Clause. But before we do so, we must find that the question is presented in a "case" or "controversy" that is, in James Madison's words, "of a Judiciary Nature."[747]

According to Roberts' interpretation, the Constitution's directive that the legislative branch has the authority to make law and the judicial branch has the authority to review law precludes the Court from evaluating the merits of the law. Roberts thus frames the first reason for denying standing from an original intent and a precedential position, and he advances his rationale by arguing that the Court exceeds its authority, and therefore

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[745] 1 Cranch 137 (1803).

[746] *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982): 474, quoting *Flast* v. *Cohen* 392 U.S. 83 (1968): 95.

[747] 547 U.S. 332 (2006): 4-6. See Farrand, *Records of the Federal Convention of 1787*, 430, for the quote from Madison.

directly violates a constitutional directive, if the Court engages in the legislative function.

Roberts further develops the legislative/judicial branch distinctions to ground the second reason for why the taxpayers lack standing. Roberts argues that taxpayers cannot dictate to the government how it utilizes any revenue it gains from the tax credits, such as reducing the taxpayers' burdens or increasing services for them. In fact, Roberts argues, "the decision how to allocate any such savings is the very epitome of a policy judgment" that falls under the authority of "lawmakers," and courts lack the authority to tell those lawmakers how to exercise their spending powers.[748] Consequently, "[f]ederal courts may not assume a particular exercise of this state fiscal discretion in establishing standing," and therefore "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by their virtue of their status as taxpayers."[749] Roberts uses an institutional argument within the structural modality to demonstrate that the core requirement for a claim of standing—an actual injury caused by a direct action of another party—is absent from the taxpayers' case, and the Court will not create a potential harm to provide standing for the taxpayers.

For his final reason for denying standing, Roberts evaluates the taxpayers' interpretation of Court precedent. The taxpayers primarily rely on *Mine Workers* v. *Gibbs*,[750] which they argue allows the Court to extend "supplemental jurisdiction" to

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[748] 547 U.S. 332 (2006): 9.

[749] 547 U.S. 332 (2006): 10-11.

[750] 383 U.S. 715 (1966).

address group state-law claims. Roberts notes that in applying *Gibbs*, the Court takes a "markedly more cautious" approach and rarely invokes *Gibbs* to allow a diversity of plaintiffs to claim standing. "What we have never done," Roberts explains, is apply *Gibbs* and extend supplemental jurisdiction to "a claim that does not itself satisfy those elements of the Article III inquiry," as is the situation with the instant case.[751] Agreeing with the taxpayers' reading of *Gibbs* "would amount to a significant revision of our precedent interpreting Article III," and Roberts concludes that such a reading would alter the existing balance of power continually reaffirmed by precedent, and creating a new ground for standing would make future Court efforts that attempt to protect the separation of powers sound like "hollow rhetoric."[752] Roberts thus offers an argument from analogy within the doctrinal and prudential modalities to demonstrate, once again, that the Court should exercise judicial restraint.

In his opinion for the *DaimlerChrysler* Court, Roberts appears to resolve the case from a positivist and prudentialist approach. Consistent with his testimony during his confirmation hearings, Roberts refuses to overturn precedent, as so doing would alter the stability and predictability of the law. Consistent with how he interprets the doctrine of standing in both *Lujan* opinions, Roberts refuses to judicially-create a new claim for standing in the absence of an actual injury. Roberts' biggest test on standing, however, was yet to come.

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[751] 547 U.S. 332 (2006): 16.

[752] 547 U.S. 332 (2006): 17.

In what many critics viewed as a political and ideological decision, Roberts wrote the dissenting opinion in *Massachusetts* v. *Environmental Protection Agency*.[753] In the case, the petitioners argued that the EPA's failure to enact stricter motor vehicle emissions standards to help reduce greenhouse gas emissions contravened provisions of the Clean Air Act and therefore placed Massachusetts' coastal land at risk from the effects of global warming. On its face, the case appeared to be the perfect opportunity for Roberts to demonstrate that he did not oppose efforts to protect the environment. Roberts, however, would not capitulate to his critics when the Court faced an equally important issue: creating a new ground for invoking the standing doctrine.

Roberts begins his dissent by agreeing with the petitioners: "Global warming may be a 'crisis' . . . [that] may ultimately affect everyone on the planet. . . ."[754] His agreement with them, however, ends there. Roberts' cites Scalia's *Lujan* opinion and Roberts stakes out his position on the question the Court faces: "This Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts."[755] Roberts thus frames his interpretation and resolution of the case in the same manner as he did in his *DaimlerChrysler* opinion: the separation of powers doctrine provides guidance to the Court about which branch of the government possesses the authority to combat global

[753] 549 U.S. 497 (2007).

[754] 549 U.S. 497 (2007): 1.

[755] 549 U.S. 497 (2007): 1. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992): 576.

warming, and standing requires proof of an actual harm caused by a direct action of another party.

Roberts initially structures his defense from a positivist perspective. A 'rule of recognition' controls the case: petitioners must prove that the harm they incur can be corrected by the redress they seek in court. In other words, if the state enacts stricter motor vehicle emissions standards, those standards will reduce greenhouse gas emissions enough to protect the coastal lands. Roberts argues that "[b]efore determining whether petitioners can meet this familiar test, however, the Court changes the rules."[756] The *Massachusetts* majority found that the petitioners faced a potential harm, at some point in the future, from global warming, a clear break from prior Court standing requirements and from Court precedent. With its decision, Roberts believes the Court therefore creates an invalid rule. As Roberts explains, "Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence;" the Court's jurisprudence, and the obligation of petitioners, is "the bedrock requirement of showing injury, causation, and redressability to satisfy Article III."[757] For Roberts, the central issue in the case does not involve the debate about the existence of global warming or its impacts; rather, the central issues are first, whether the petitioners can prove that the absence of stricter standards directly causes their injury and that the enactment of stricter standards will alleviate the injury, and second, which branch of the government possesses the authority to enforce those standards.

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[756] 549 U.S. 497 (2007): 2.

[757] 549 U.S. 497 (2007): 3-4.

As he did in his *DaimlerChrysler* opinion, Roberts then frames the issue within the separation of powers doctrine. The *Massachusetts* majority considered the conflicting evidence about the globalized versus localized sources for greenhouse gas emissions, and they conceded that the emissions from other nations will continue and that a host of different feedback mechanisms influence global warming. As Roberts explains, the academic and scientific disagreements about global warming contribute to the problem the Court faces: "The constitutional role of the courts, however, is to decide concrete cases—not to serve as a convenient forum for policy debates."[758] For Roberts, the uncertainties associated with which emissions, global or local, will impact Massachusetts' coastal land demonstrates that the petitioners cannot prove that local emissions are the cause of coastal land destruction and that stricter emissions standards will alleviate the impacts to global warming. Thus, the petitioners have not met the injury, causation, and redressability requirements necessary for a standing claim. Failure to meet this requirement, as Roberts argues, raises "cases and controversies" questions, and when the Court decides to act based on the merits of a case, the Court undermines "the tripartite allocation of powers set forth in the Constitution"[759] (the phrase Roberts used in his *DaimlerChrysler* opinion, which he includes in his *Massachusetts* dissent), and Roberts concludes his dissent by lamenting the majority's failure to limit its discretion.

[758] 549 U.S. 497 (2007): 13.

[759] 549 U.S. 497 (2007): 13.

As his *DaimlerChrysler* and *Massachusetts* opinions demonstrate, whether Roberts writes an opinion on the same issue for either the majority or the dissenting Justices, he approaches each case from the same philosophical perspective, and to resolve the competing claims he applies his positivism and prudentialism in a consistent manner. In both cases, Article III standing requirements established the 'rule of recognition,' constitutional directives provided guidance as to whether the legislative or the judicial branch possessed the authority to alter the valid rule/law, and Roberts' advocated for judicial restraint in both cases. While people may disagree with how Roberts resolved the questions in the cases, at the same time they should recognize that his memoranda, testimony, and opinions all reflect that he consistently applied his judicial philosophies to resolve constitutional and statutory questions about the standing doctrine.

Now Batting: International Law

Two cases before the Court provided critics an opportunity to assess whether Roberts would resolve cases that raised international law and precedent issues consistent with the testimony he provided to the Judiciary Committee during his Court confirmation hearings. The first case, *Sanchez-Llamas* v. *Oregon*,[760] involved whether Article 36 of the Vienna Convention on Consular Relations afforded nationals detained by another country access to their consular officials. The second case, *Medellin* v. *Texas*,[761] addressed the question of whether a judgment of the International Court of

[760] 548 U.S. 331 (2006). Decided with *Bustillo* v. *Johnson*, 05-51.

[761] 552 U.S. 491 (2008).

Justice is enforceable as domestic law. In both cases, Roberts faced a significant challenge: how to balance the United States Constitution and its directives and protections with international law.

Writing for the *Sanchez* Court, Roberts approached the questions in the cases from a Justice Butler-like originalist perspective: he (figuratively) placed the texts of the Constitution and the Vienna Convention and Article 36 side-by-side and accordingly resolved the issues. For example, Sanchez-Llamas claimed that because the police never advised him of his rights, his statements to the police therefore were inadmissible and should be suppressed. Sanchez-Llamas did not claim the Convention afforded him that right, which Roberts noted was "a wise concession. The Convention does not prescribe specific remedies for violations of Article 36. Rather, it expressly leaves the implementation of Article 36 to domestic law . . . As far as the text of the Convention is concerned . . . [i]t would be startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation."[762] Roberts thus places both the international text and the domestic text within the original meaning perspective, and he uses the historical and textual modalities to differentiate between the two with respect to their protection of rights. Later in his opinion, Roberts switches to the prudentialist perspective, and he quotes the *United States* v. *Leon* opinion, on which he wrote a memorandum twenty years earlier, and he advises that "[u]nder our domestic law, the exclusionary rule is not a remedy we apply lightly. . . . Because the rule's social

[762] 548 U.S. 331 (2006).

costs are considerable, 'remedial objectives are thought most efficaciously served.'"[763] Roberts' switch allows him to place the rights' violation claim within the context of domestic constitutional law, a strategy he uses to support his conclusion to the case.

Roberts also addresses Sanchez-Llamas' claim that the Supreme Court should invoke its "supervisory authority" and require the Oregon courts to suppress the state's evidence. Roberts shifts to the positivist perspective and he provides an institutional argument within the structural and doctrinal modalities to explain that "the law is clear" on whether the Court can supervise the judicial proceedings of state courts (it cannot), and if the text of the treaty fails to identify specifically how the Court can "create a judicial remedy applicable in state court," then "it is not for the federal courts to impose one on the States through lawmaking of their own."[764] Roberts explains that in the absence of the Convention's textual clarity, the Supreme Court possesses the authority, as Chief Justice Marshall explained in *Marbury* v. *Madison*, "to say what the law is."[765] Roberts uses the argument from authority to transition into an international doctrinal modality, and he explains that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts," especially since "[a]ny interpretation of the law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; [and] there is accordingly

[763] 548 U.S. 331 (2006): 12, quoting *United States* v. *Leon*, 468 U.S. 897 (1984): 908.

[764] 548 U.S. 331 (2006): 11-12.

[765] 1 Cranch 137 (1803): 177, 19.

little reason to think that such interpretations were intended to be controlling on our courts."[766]

Roberts thus resolves the statutory and constitutional questions for the *Sanchez* Court with originalist and positivist components that he incorporates into his prudentialist philosophy. His resolution of the case parallels the testimony he gave during his hearing and on his written responses, and he effectively reframes an international issue within a domestic context. In his final prudentialist act, Roberts concludes his opinion with 'modesty and humility.' As Roberts explains,

> Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. Our holding in no way disparages the importance of the Vienna Convention. . . . It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.[767]

In his second case addressing international law, Roberts wrote the Court's opinion in *Medellin* v. *Texas*. One of the key issues in the case was whether President Bush (43) possessed the authority to convert a non-self-executing treaty into a self-executing treaty through his "Memorandum to the Attorney General."[768] The interesting aspect of the case is that the majority of the opinion addresses presidential power and refutes the dissent's arguments and the opinion devotes little attention to the petitioner's *habeas corpus* claim.

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[766] 548 U.S. 331 (2006): 19-20. Italics in original.

[767] 548 U.S. 331 (2006): 25.

[768] February 28, 2005. The relevant language was "that the United States would 'discharge its international obligations' under *Avena* 'by having State courts give effect to the decision.'" 552 U.S. 491 (2008): 2. See *Case Concerning Avena and Other Mexican Nationals* (*Mexico* v. *United States*) 2004 I.C.J. 12.

Roberts addresses the issues in the case similar to how he addressed issues in his appellate opinions. To introduce his rationale for the decision, Roberts opens with a familiar sentence: "The interpretation of a treaty, like the interpretation of a statute, begins with the text."[769] The dissent in the case disagrees with this approach, but Roberts explains that "[t]he interpretive approach employed by the Court today—resorting to the text—is hardly novel," one which Roberts notes is a "time-honored textual approach."[770] Roberts justifies his originalist approach not with an original intent or an original meaning argument, but instead with an "original writing" argument—the text of the Constitution. As Roberts explains to the dissent,

> Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, §7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, §2. The dissent's understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.[771]

Roberts employs a tactical argumentative strategy: by not grounding his position on the ambiguity of the framers' and ratifiers' intentions or on how the meaning of constitutional ideas change with the times, Roberts' reliance on the actual text of the Constitution provides a clear example of how the dissent's approach to the case would undermine the separation of powers doctrine and promote court-created law: "The

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[769] 552 U.S. 491 (2008): 10.

[770] 552 U.S. 491 (2008): 18.

[771] 552 U.S. 491 (2008): 19.

dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create law."[772] Roberts later closes this section of his opinion with another similar phrase from his appellate court opinions, and he places the dissent's lack of judicial restraint, and therefore Medellins' claim, within the context of a statutory case in which the petitioner misread Congress' intent. As Roberts notes, "[s]uch language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result."[773]

Roberts' opinion not only criticizes the dissent's 'bold foray into policy-making,' it criticizes the president's venture into the legislative realm as well. Roberts offers an argument from coherence to explain how the president's directive in his Memorandum exceeded his executive branch authority with respect to the treaty process. As Roberts explains, "The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[774] Roberts again offers an "original writing" interpretation, and he notes

[772] 552 U.S. 491 (2008): 20.

[773] 552 U.S. 491 (2008): 26.

[774] 552 U.S. 491 (2008): 30.

that Article II, §2 only allows the president to "make" a treaty; a Senate vote is required for ratification. Moreover, the Constitution vests legislative powers to Congress, not the president, and therefore the president lacks the authority to unilaterally implement binding law on the states. Roberts supports his contention with an argument from authority, and he cites Madison's *Federalist #47*,[775] which explains the checks and balances system for the Republic's government. Roberts therefore concludes that the president cannot make and enforce laws.

Roberts' interpretive approaches in his *Sanchez* opinion and his *Medellin* opinion ultimately reflect his prudentialist philosophy. He incorporates components from a revised originalism and from positivism to advance his positions on judicial restraint, the limited breadth of executive and judicial authority, deference to the intent of Congress, and the role precedent and the constitutional text play in each of those positions. At the same time, Roberts evaluates the costs associated with unsettling the separation of powers doctrine and upsetting the system of checks and balances, especially with respect to how those costs impact the directives and principles the Constitution establishes. Once again, Roberts resolves statutory and constitutional questions consistent with the approach he utilized in his memoranda, appellate court opinions, and confirmation testimony.

Assessing the Umpire

Chief Justice John Roberts said that when he joined the Supreme Court, he wanted to be the umpire no one came to the game to see. He wanted to establish a fair

[775] 552 U.S. 491 (2008): 32.

zone over home plate, and he wanted to call balls and strikes to the best of his abilities. He announced that he might get some of the calls right and he might get some of the calls wrong, but when people played a game in front of him, they knew what to expect from the umpire in the black robe.

So what kind of umpire is Chief Justice Roberts? A Conservative/conservative ideologue who advances his policy agenda and makes the rules according to his personal preferences, or is he an objective jurist who promotes the rule of law?

A close-reading of his Supreme Court confirmation testimony and his published opinions from his first four Terms on the Court paints a different picture than the one described by many critics and opponents of his nomination. Roberts consistently approached constitutional and statutory questions from the prudentialist philosophy, into which he incorporated components of originalism and positivism. He consistently rejected the formalist, realist, pragmatist, and Dworkinist philosophies as interpretive lenses for viewing competing claims. For Roberts, a Justice is not a technician who decides cases in a mechanical way, nor is a Justice empowered to change or create law from the bench so that the law fits the goals or ideals that the Justice believes it should satisfy; instead, a Justice must follow the valid 'rules of recognition,' practice judicial restraint, recognize the 'limited breadth of judicial authority' and avoid 'bold forays into policy-making,' exercise 'modesty and humility,' defer to the legitimate decision-making of other institutions and branches of the government, and remember that the statutory text, precedent, and the constitutional text provide the only rulebook needed to umpire a case before the Supreme Court.

As this chapter demonstrated, Roberts utilized a variety of argument 'types' and argument modalities to advance his prudentialist approach to interpret constitutional and statutory questions. At the same time, the chapter demonstrated that Roberts advocated consistent positions in his memoranda, in his appellate court and Supreme Court confirmation hearings, and in his appellate court and Supreme Court opinions. Hopefully, rather than "speaking niceness to power,"[776] the chapter instead reflected that Chief Justice John Roberts strives to call a fair game, for petitioners and defenders alike, according to the rule of law.

[776] James Arnt Aune, "The Politics of Rhetorical Studies: A Piacular Rite," *Quarterly Journal of Speech* 92 (2006): 69.

CHAPTER VI

CONCLUSION

In 1964, communication scholar Warren Wright suggested that with a "rhetorical study" of judicial opinions, "critics may be able to analyze another force at work in the American nation and thus transcribe a hitherto unwritten part of the history of American rhetoric."[777] Almost twenty years later, another communication scholar, Richard Rieke, noted that for "the study of law as a field . . . there is no established methodology or design" to guide such an argumentative or rhetorical study.[778] Twenty-five years later, legal scholar Eveline Feteris observed, "One of the major 'gaps' in the study of legal argumentation and legal reasoning is the gap between more or less abstract philosophical and theoretical studies of legal reasoning on the one hand, and legal arguments as they occur in actual legal practice on the other hand."[779] Legal scholar Francis Mootz explains that "rhetorical knowledge" allows critics "to develop a public discussion along new lines of argumentation that motivate action," and he argues that "[t]he legal system is one of the most important fora for the development of rhetorical knowledge in contemporary American society. This is true at all levels of legal discourse."[780]

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[777] Wright, "Judicial Rhetoric," 72.

[778] Rieke, "Investigating Legal Argument as a Field," 154. Rieke suggested that scholars interested in conducting "argument field" investigations might approach their studies through psychological, discourse descriptive, argument ecology, dramatistic, Toulmin layout, rhetorical logic, or formal logic methodologies.

[779] Feteris, "The Rational Reconstruction of Complex Forms of Legal Argumentation," 396.

[780] Francis J. Mootz, III, "Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition," *Yale Journal of Law & the Humanities* 11 (1999): 325.

This project attempted to address these scholars' concerns by offering a new approach for the study of the genre of judicial discourse known as 'legal rhetoric.' Rather than viewing legal argument 'types' and argument modalities as independent elements of judicial discourse, and rather than viewing a judicial philosophy as an interpretive methodology that identifies whether a Justice fits the 'conservative' or 'liberal' label, this project examined how argument 'types,' argument modalities, and judicial philosophies interrelate and therefore provides a more complete and objective approach to the study of judicial discourse, and the legal reasoning and decision-making process. By first identifying an argument 'type' and then placing it within an argument modality, critics can determine how the two fit within or exclude a particular judicial philosophy. This methodological approach, therefore, provides a more succinct and accurate explanation of the type of interpretive philosophy being used to resolve constitutional and statutory questions.

At the same time, this study also provided a compelling rationale for reevaluating the currently held conceptions about 'legal rhetoric.' Rather than associate pejorative connotations with the terms, this project demonstrated that scholars should rethink their conceptions and instead assign a more objective and succinct definition for the terms: Legal rhetoric is the use of argumentative strategies within a text to advance a position and to ground the rationale and reasoning for that position. Viewed through this lens, a speaker's or writer's use of legal rhetoric becomes an integral part of that person's advocacy and defense for a particular position. This project demonstrated that argument 'type' and argument modality are the critical elements for the advocacy or defense of a

particular position on an issue; when used together, ‘type’ and modality thereby form the basis for the argumentative strategy used to defend or to refute a position. When viewed from this perspective, then, scholars and critics should recognize that ‘legal rhetoric’ plays an important role in judicial discourse.

This project also contributed to the “Law and Rhetoric” movement and demonstrated that scholars can study the field of law from an interdisciplinary perspective. The ongoing dialogues and efforts in the fields of law, communication, history, and political science provide excellent research that, when incorporated into a more exhaustive study, allows these research projects to contribute to a more holistic study of judicial discourse. The project contributed to the ongoing discussions in each of the independent fields, and it also joined the “Law and Rhetoric” movement by offering a new methodological approach for studying the law from a legal and rhetorical perspective. Hopefully, the project also demonstrated that the fields can engage one another rather than “talk past” one another, or worse yet, ignore one another. More productive scholarly endeavors should incorporate elements of each field’s research into a single project, as this one did, to demonstrate how a unified approach provides a more complete assessment of the judicial or legal topic that serves as the focus of the study.

Finally, this project demonstrated that rhetorical criticism provides scholars with an effective methodology for the study of judicial discourse. By conducting a study through the paradigm of rhetorical analysis, this project demonstrated that rhetorical criticism satisfied three important objectives. First, the project’s methodological approach served an instructive function, as the study identified, analyzed, and evaluated

legal discourse from a variety of settings, and therefore offered insight into constructing effective (or ineffective) argumentative or persuasive judicial discourse. Second, the approach served a reconstructive function, as the study provided new insight into a variety of legal texts and offered a new perspective on how to 'read' those legal texts by examining why the writer and speaker made certain argumentative choices and how those choices served the writer's/speaker's purpose. Finally, the approach provided an evaluative function, as the study explored how the legal texts provided a response to problematic constitutional, statutory, political, and judicial situations that required an oral or written response.

A Stealth Umpire?

In his first commencement address delivered as Chief Justice, John Roberts joked to Georgetown Law School's graduating class, "I have no track record when it comes to commencement addresses. You might even say I'm something of a stealth commencement speaker."[781] Roberts' quip reflects the view of him that many people held prior to Roberts' Supreme Court confirmation hearings. This project, therefore, attempted to provide an answer to the singular question that dominated the pre-hearing judicial and political climate: Was Judge John G. Roberts truly a 'stealth candidate' lacking a paper trail for Senate Judiciary Committee members, the media, and interested Court followers to examine?

[781] John Roberts, "Webcast—Chief Justice Roberts 2006 Commencement Address," May 21, 2006, http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144 (accessed April 1, 2006).

As this project demonstrated, John Roberts was not, in fact, a 'stealth candidate' who lacked a paper trail for people to follow. His letters and memoranda from his service during the Reagan and Bush (41) administrations, his appellate court confirmation hearings, his appellate court opinions, and his law review articles actually provide a wealth of information on the argumentative strategies and the judicial philosophies Roberts' utilized to resolve competing claims over constitutional and statutory questions. This project, in essence, "vetted" Roberts' pre-Court paper trail and revealed that Roberts was not an enigmatic jurist waiting to assume a seat on the nation's highest appellate court; instead, Roberts' writings and testimony provided ample materials upon which people could make assessments regarding Roberts' jurisprudential thinking.

A Fair or Foul Umpire?

To address the larger issues associated with John Roberts' seating on the High Court, this project attempted to answer four additional and related questions: What types of argumentative and rhetorical strategies does Roberts utilize in his oral and written discourse to justify a position on a constitutional or legal issue?; Do Roberts' pre-Court argumentative and rhetorical strategies reveal his judicial temperament and constitutional philosophy?; Do Roberts' pre-Court argumentative and rhetorical strategies parallel the argumentative and rhetorical strategies he utilizes in his published appellate court and Supreme Court opinions?; and, Do Roberts' published opinions reflect a discernable judicial temperament and constitutional philosophy?

A close-reading of Roberts' legal texts—his articles, letters, memoranda, opinions, and testimony—provides answers for those questions. Roberts possesses a sharp wit, and he uses humor to advance arguments on a position. In fact, Roberts' humor and wit comprise an important element of the overall interpretive approach he uses to resolve constitutional and statutory questions.

A close-reading of Roberts' legal texts also provides insight into whether Roberts was/is a Conservative/conservative ideologue who advances his policy agenda and changes/makes the rules according to his personal preferences, or whether he was/is an objective jurist who promotes the rule of law. Following Roberts' paper trail and evaluating his Supreme Court confirmation hearing testimony and published opinions reveals a portrait of a complex jurist.

Roberts incorporates a variety of legal argument 'types' within specific argument modalities to frame his resolution of the constitutional or statutory questions at issue. At the same time, he constructs his argumentative strategies within a specific interpretive paradigm, the paradigm he thus uses to provide the rationale for his decision on the questions at issue. As this project demonstrates, Roberts consistently resolved constitutional and statutory questions from a multifaceted interpretive approach: he incorporated components of originalism and positivism into the prudentialist philosophy. For Roberts, the text of the Constitution and the text of statutes provide the only rulebooks a judge/Justice needs to resolve competing claims; the Constitution, precedent, and statutes create the valid 'rules of recognition' that limit the 'breadth of judicial authority' and that require judges/Justices to exercise judicial restraint; and,

judges/Justices should avoid 'bold forays into policy-making,' they should exercise 'modesty and humility,' and they should defer to the legitimate decision-making of other institutions and branches of the government, as the system of checks and balances and the separation of powers doctrine are vital components of America's governmental structure.

As this project also demonstrated, Roberts consistently discounted or rejected other judicial philosophies. Roberts does not agree with the formalists' belief that a judge/Justice is a technician who resolves cases in a mechanical way, nor does Roberts support the realist, pragmatist, or Dworkinist interpretive philosophies since judges/Justices lack the authority to change or create law from the bench so that the law fits the goals or ideals that the Justice believes it should satisfy. Roberts instead consistently advocated throughout his testimony and writing that judges and Justices should officiate disputes as neutral arbiters who follow the rule of law, and who should let the legislatures create, alter, or nullify rules and laws.

The Supreme Court's Chief Umpire

In his review of the Roberts Court after five Terms, Roger Parloff made an observation about the future of the Court that parallels a contention advanced throughout this project:

> What will certainly happen is that labels like 'liberal' and 'conservative' will become inadequate to describe the Court's divisions on many key questions as they emerge . . . When those tough questions of the future arrive, we'll have the comfort of knowing that there will be a smart guy with intellectual integrity leading the Court that has to grapple with them.[782]

[782] Roger Parloff, "On History's Stage: Chief Justice John Roberts Jr.," *Fortune*, January 17, 2011: 76.

As this project emphasized, convenient labels do not provide answers to the questions about the judicial philosophy to which a Justice subscribes, nor do the labels accurately identify the argument 'types' or modalities that a Justice will use to resolve constitutional and statutory questions. The Court's work is far too difficult, and the Justices' legal reasoning and decision-making processes are far too complex, for interested Court followers to make ideological assumptions about a Justice simply based on the party affiliation of the president who nominated the Justice. As Chief Justice Roberts would say, "Enough is enough." Perhaps more scholarship that engages both the study of the law and the Supreme Court from an interdisciplinary perspective and that utilizes rhetorical criticism as a methodological approach will provide further insight about the men and women who don the black robes "to do their duty as faithful guardians of the Constitution[.]"[783]

[783] Hamilton, "Federalist No. 78: The Judiciary Department," 469.

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VITA

Jay Maurice Hudkins received his Bachelor of Science in Education degree in English and speech communication from Baylor University in 1991. He entered the speech program in the Department of Communication Studies at Baylor University and received his Master of Arts degree in August 1992. He entered the Department of Communication at Texas A&M University in the fall of 2002 and graduated in August of 2011. Mr. Hudkins works at Arkansas Tech University in Russellville, Arkansas.

Mr. Hudkins may be reached at Jay M. Hudkins, Arkansas Tech University, Department of Speech, Theatre, and Journalism, Energy Center Building, 1815 Coliseum Drive, Russellville, AR 72801. His email is JMHudkins@gmail.com.